Supreme Court, U.S.
FILED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

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**BANK ONE, TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LELIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN; JOHN H. MCMULLEN, JR.; and ANDY J. MCMULLEN,**
**Petitioners**

**V.**

**UNITED STATES OF AMERICA; KCS RESOURCES, INCORPORATED; TESORO EXPLORATION AND PRODUCTION COMPANY; TRANSTEXAS GAS CORPORATION, Respondents**

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**Attorney for Petitioners**

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## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

A - Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, filed October 16, 1998, sought to be reviewed

Fifth Circuit Order

B - *Memorandum and Order* of the United States District Court for the Southern District of Texas, Laredo Division, filed July 11, 1997

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C - *Order of Dismissal* from the United States District Court for the Southern District of Texas, Laredo Division, filed July 11, 1997

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D - *Memorandum and Order* of the United States District Court for the Southern District of Texas, Laredo Division, entered August 15, 1997

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E - Order Denying Petition for Rehearing of the United States Court of Appeals for the Fifth Circuit, filed December 23, 1998

Fifth Circuit Order

F - *Second Amended Complaint to Adjudicate Title to Real Property Pursuant to 28 U.S.C. § 2409a*, together with the following attachments thereto:

Exhibit "A" - Will of Susie McMullen Langille

Exhibit "B" - Codicil to Will of Susie McMullen Langille

Exhibit "C" - Conveyance from H. J. McMullen to McMullen Oil & Royalty Company, Inc., dated November 19, 1928, which appears in Vol. 20, at p. 87

of the Deed Records of Zapata County, Texas

Exhibit 1 - Relevant Portions of *Amended Petition in Condemnation No. 3*

Exhibit 2 - Relevant Portions of *Amended Petition in Condemnation No. 12*

Exhibit 3 - Relevant Portions of *Offer to Lease and Lease for Oil and Gas* from United States Department of the Interior, Bureau of Land Management to Tesoro Exploration and Production Company, dated August 1, 1989

Vol. 2, Dkt. 29

G - Copy of Unpublished Opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 97-40149, *United States of America v. 85,237 Acres of Land, More or Less, Et Al* (the Condemnation Action), filed September 17, 1997

H - Federal Rules of Civil Procedure Involved in the Case which Are Too Lengthy for Inclusion in the Body of the Petition

# APPENDIX A

Opinion and Judgment of the United States Courtof Appeals for the Fifth Circuit, filed October 16, 1998, sought to be reviewed

Fifth Circuit Order

**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

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No. 97-41085

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BANK ONE TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LILIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN; JOHN H. MCMULLEN; ANDY J. MCMULLEN,

Plaintiffs -Appellants,

versus

UNITED STATES OF AMERICA; KCS RESOURCES INCORPORATED; TESORO EXPLORATION AND PRODUCTION COMPANY; TRANSTEXAS GAS CORPORATION; TESORO E & P COMPANY, Limited Partnership,

Defendants -Appellees.

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Appeal from the United States District Court
for the Southern District of Texas

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Before REYNALDO G. GARZA, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

Bank One Texas, N.A. ("Bank One"), Lilia Beatrice Cox

Harris, Linda Harris Beard, Margie Harris Newton, John H. McMullen and Andy J. McMullen ("the McMullens") appeal the dismissal of their Quiet Title Action ("QTA"), 28 U.S.C. § 2409a (1994), claim. We affirm.

I.

In 1927, H. J. McMullen bought "an undivided one-sixteenth interest in and to all oil, gas and other minerals in and under, and that may be produced from" several pieces of land located in Zapata County, Texas, totaling slightly more than 1000 acres ("mineral interests") He later ceded to McMullen Oil & Royalty, Inc.("McMullen Oil"), "any and all moneys of any kind or character paid by any person [sic] firm or corporation, in any way or manner, as down payment (sic) bonus money or delay rentals, in connection with" leases of the mineral interests, as well as the "power and authority to execute", such leases. McMullen Oil, in return, paid $10.00, and promised that all royalties from the mineral interests would be "the property of H. J. McMullen, individually and his heirs, representatives and assigns" and that the leases would direct payment of royalties to H. J. McMullen.

H. J. McMullen died in 1934. He left everything to his wife, Susie McMullen. Susie McMullen, who later married George

> To make demands, sue and receipt for all amounts due and owing to, and claims and causes of action owned by or involving this Trust; and, to defend all claims and causes of action asserted against the Trust property, or this Trust, or the interest of any beneficiary therein, and to settle and compromise for, and on behalf of this Trust, and all beneficiaries of same, all claims, demands, and causes of action involving either the Trust property or the right, title or interest of any beneficiary therein, now in being or unborn; all of which said settlement and compromise as so made by said Trustee, shall be made by the Trustee acting upon its sole and exclusive discretion and judgment, and when made, shall be binding upon all of the Trust Estate whether in being or unborn.

FWNB, as trustee, acquired the legal title to the Langille Trust's property, while the beneficiaries took an equitable interest. See *Cutrer v. Cutrer*, 334 S.W.2d 599, 605 (Tex. Civ. App.-San Antonio 1960) ("for a trust to be a trust, the legal title must immediately pass to the trustee, and beneficial or equitable interest to the beneficiaries"), *aff'd*, 162 S.W.2d 513 (Tex. 1961); *see also Shearrer v. Holley*, 952 S.W.2d 74, 78 (Tex. App.-San Antonio 1997, no writ) (observing that the merger of legal and equitable interests ends a trust).

The Government instituted a condemnation action in 1949 against approximately 85,237 acres in Zapata County to obtain land

Langille, died in 1938. Her will placed the residue,[1] of which the mineral interests were a part, in trust ("Langille Trust"). It named her two children as life beneficiaries of the Langille Trust; they were to receive payments from the trust res for the duration of their lives. *See Dickson v. Dickson*, 544 S.W.2d 200, 201 (Tex. App.-Austin 1976, writ dism'd w.o.j.) (describing life beneficiaries of a trust). The will named the heirs of Langille's children as remainder beneficiaries of the Langille Trust; they were to receive any res remaining upon the death of the surviving child. *See Barcelo v. Elliott,* 923 S.W.2d 575, 576 (Tex. 1996) (describing remainder beneficiaries of a trust). This remainder interest immediately vested because one of Langille's grandchildren, Glenn Harris, Jr., was alive when she died. *See Caples v. Ward,* 179 S.W. 856, 857-58 (Tex. 1915) ("A remainder is vested where there is a person in being who would have an immediate right to the possession upon the termination of the intermediate estate."). Langille's will designated Fort Worth National Bank ("FWNB") as trustee of the Langille Trust. It granted the bank, in that capacity, the following authority:

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[1] The residue in [t]he surplus of a testator's estate remaining after all the debts, taxes, costs of administration, and particular legacies have been discharged." Black's Law Dictionary 1310 (6th ed. 1990)

exception. *See* 40 U.S.C. 5 258a (1994) (Declaration of Taking Act).[3]

The Government served FWNB, as "Executor and Trustee under the will of Susie McMulle(n) Langille," with a notice of the condemnation action in 1955. *See* Fed. R. Civ. P. 71A(d) (3) (requiring personal service of a defendant to a condemnation action residing in the United States whose residence is known). [4]FWNB neither filed an answer, made an appearance nor sought to collect sums that the district court adjudged to be just compensation for the mineral interests, see 28 U.S.C. § 258a (1994) (creating a right to just compensation) FED. R. Civ. P. 71A advisory committee's note ("Failure on the part of the defendant to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to fix compensation, but it does not preclude the defendant from presenting evidence as to the amount of compensation due him or in

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3. The condemnation procedure established by the Declaration of Taking Act has stayed the same since the measure's enactment in 1931. See 40 U.S.C.§ 258a (1994) (Amendments)

4. Federal Rule of Civil Procedure 71A, which provides procedures for condemnation cases, became effective on August 1, 1951. See Fed. R. Civ. P. 71A advisory committee's note. it governed 'all proceedings in actions brought after it (took] . . . effect and also . . . all further proceedings in actions then pending,, unless the court found application to a given pending action infeasible or working injustice. Id.

on which to construct Falcon Dam.[2] *See United States v. 85,237 Acres of Land, More or Less, In Zapata County, Tex.*, 157 F. Supp.150, 152 (S.D. Tex. 1957), *aff'd*, 252 F.2d 116 (5th Cir. 1958). The condemnation action encompassed the properties in which the mineral interests were held. At the outset, the Government filed a Declaration of Taking that announced the taking of the lands at issue "in fee simple title absolute, subject to existing easements for public utilities and highways." It identified both FWNB, as executor and trustee under Langille's will, and McMullen oil as among the "purported owners" of each parcel in which H. J. McMullen had purchased a mineral interest. The district court subsequently entered a judgment that pronounced the lands listed in the Declaration of Taking condemned upon the Declaration's filing and that vested title to those lands in the United States in fee simple, subject to an

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2 The United States built Falcon Dam, a multipurpose storage dam, and an accompanying hydro-electric power plant on the Rio Grande River pursuant to a 1944 treaty with Mexico concerning, among other things, water utilization on the Rio Grande. *See* Treaty Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mexico, 59 Stat. 1219; *Allis Chalmers Corp. V. Friedkin*, 481 F. Supp. 1256, 1259 (M.D. Pa. 1980), *aff'd* 635 F. 2d 248 (3d Cir. 1980). It completed Falcon Dam in 1952. *See John B. Hardwicke Co. v. United States*, 467 F. 2d 488, 490 (Ct. Cl. 1972).

contesting the Government's title to the mineral interests.[6] See FED. R. Civ. P. 60(b) (listing instances in which a district court may relieve a party of a final judgment, order or proceeding). The district court dismissed for lack of subject matter jurisdiction, holding that the QTA was the exclusive means for litigating the challenge. *See United States v. 85,237 Acres of Land, More or Less*, No. 97-40419 at 1-2, 4 (5th Cir.1997) (unpublished opinion) (reporting the district court's ruling). In doing so, it rejected the contention that a 1970 order closing the condemnation action ("1970 order") was not a final judgment. *See* id. at 1 (same) We affirmed the dismissal of the Rule 60(b) motion, concluding that the 1970 order "was a final judgment" *id.* at 1, and that Bank one, Harris' heirs and the McMullens, as non-parties to the condemnation action, had "to assert their claims to the condemned property via an independent action against the United States, not a Rule 60 (b) motion," *id.* at 6. [7]

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6. Bank One's participation in the condemnation action, as well as in this came, occurred because it perceived itself as "stand[ing] in the position of" Harris, heirs and the McMullens.

7. We found no need, however, to deem the QTA the sole means for Bank One, Harris' heirs and the McMullens to pursue their title challenge. *See Bank One* at 5-6.

sharing the award or distribution.").

A disagreement about the mineral interests arose in the early 1960s. FWNB believed that the Langille Trust solely held them. McMullen Oil also claimed ownership, except for royalties. This dispute became moot in 1966, when McMullen oil conveyed to FWNB, as

"Trustee under the Will of Susie McMullen Langille", title to and interest in all of its oil, gas and mineral interests.

Langille's surviving child died in 1984. The remaining assets in the Langille Trust then were distributed to Harris and the McMullens, Langille's three grandchildren (i.e., her children's heirs). Harris and the McMullens then pooled their interests in the mineral or royalty interests that they had received from the Langille Trust to create the Red Crest Trust. They designated FWNB's successor, Texas American Bank, N.A., as trustee of the Red Crest Trust. Bank One later assumed that role.

In 1995, Bank One, Harris' heirs (Lilia Beatrice Cox Harris, Linda Harris Beard and Margie Harris Newtown)[5] and the McMullens filed a Rule 60(b) motion in the condemnation action

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5. Harris died in 1989.

filing of this suit-because Harris and the McMullens never received notice from the Government of the condemnation action. The United States and its co-defendants counter that accrual occurred upon FWNB receiving notice of the condemnation action. in support, they cite the doctrine of virtual representation, a rule of Texas trust law that declares the following:

> In actions adverse to a trust, if the dispute involves no conflict of interest between the trustee and the beneficiaries, or between the beneficiaries themselves, a trustee may sue or defend in the trustee's own name when, either by express grant or necessary implication, that power is vested in the trustee. In addition, in the absence of a conflict of interest, or of a pleading that they are inadequately represented, the beneficiaries who did not participate at trial are not considered necessary parties to the case. [10]

*Hedley Feedlot, Inc. v. Weatherly Trust,* 855 S.W. 2d 826, 833 (Tex. App—Amarillo 1993, no writ); *see also* RESTATEMENT

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10. The doctrine of virtual representation relates to relationships other than that between a trustee and beneficiary. *See* Restatement (Second) Of Judgments § 41 (1) (1982) (listing the occasions when the doctrine of virtual representation controls); 18 Charles Alan Wright et al., Federal Practice and Procedure § 4457 (1981 & Supp. 1998) (discussing the development of the doctrine of virtual representation). For example, it controls when the earlier case concerned "[t]he representation of a class of persons similarly situated, designated as such with approval of the court, of which the person is a member." Restatement, *supra* §41(1) (e). The Fourth Circuit has decided whether or not judgments in earlier condemnation actions bind QTA claimants by looking to see of those proceedings fall within that particular situation. *See Klugh v. United States,* 818 F. 2d 294, 300-01 (4th Cir. 1987) (observing that "[t]he doctrine of virtual representation is recognized by federal and state law alike in this case" and applying it).

While their appeal of the dismissal of their Rule 60 (b) motion was pending,[8] Bank One, Harris, heirs and the McMullens brought a QTA suit disputing the United States' title to the mineral interests in 1996. The district court, relying on the complaint and the undisputed facts, held the action barred by the QTA's twelve-year statute of limitations, granted summary judgment and entered a dismissal order.[9] It again rejected the argument that the 1970 order failed to constitute a final judgment in the condemnation action. A timely appeal followed.

II.

The parties differ over whether or not this case comes within the QTA's twelve-year statute of limitations. Bank One, Harris' heirs and the McMullens argue that their claim accrued when Harris and the McMullens vested in possession in 1984-twelve years prior to the

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8. Bank One, Harris, heirs and the McMullens initially sued only the United States. They subsequently added as defendants KCS Resources, Inc., Tesoro Exploration and Production Company, TranmTexas Gas Corporation and Tesoro 9 & P Company, which were alleged to be entities 'conducting mineral production operations, on the lands in which the mineral interests were held.

9. We construe the district court's disposition as a dismissal for lack of subject matter jurisdiction. See infra pp. 11-12 and note 12.

plaintiff or his predecessor in interest knew or should have known of the claim of the United States" as the time when an action accrues.[11] *Id.*

The QTA is a waiver of sovereign immunity. *See Block v. North Dakota ex rel. Board of Univ. and Sch. Lands,* 461 U.S. 273, 280, 103 S. Ct. 1811, 1816, 74 L. Ed. 2d 840, ___(1983). Therefore, the measure's statute of limitations manifests a condition to this waiver. *See Mottaz,* 476 U.S. at 841, 106 S. Ct. at 2229, 90 L. Ed. 2d at ___ (QTA case). As such, it must be construed strictly in favor of the Government. *See Block,* 461 U.S. at 287, 103 S. Ct. at 1819-20, 75 L. Ed. 2d at _____ ("when Congress attaches conditions to legislation waiving sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied"). Moreover, because it circumscribes the scope of a waiver of sovereign immunity, the statute of limitations manifests a jurisdictional prerequisite, rather than an affirmative defense. *See Mottaz*, 476 U.S. at 841, 106 S. Ct. at 2229, 90 L. Ed. 2d at _____; *see also Block*, 461 U.S. at 287, 292, 103, S. Ct. at 1823,

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11. "Knowledge of the claims full contours is not required. All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." *Knapp v. United States,* 636 F. 2d 279, 283 (10th Cir. 1980).

(SECOND) OF JUDGMENTS § 41(1)(a) (1982) (stating that the doctrine of virtual representation applies when "[a] person is represented by a party who is...[t]he trustee of an estate or interest of which the person is a beneficiary"). The Government and its co-defendants maintain that the notice to FWNB of the condemnation action against the mineral interests in 1955 bound Harris and the McMullens because the doctrine made the bank, "as trustee,... the only necessary party to the condemnation proceeding." In other words, they believe the doctrine should work to impute FWNB's knowledge of the adverse claim, acquired decades before this case began, to Harris and the McMullens.

The QTA permits civil actions contesting a right, title or interest in real property claimed by the United States. *See 28* U.S.C. §§ 2409a (a) & (d), 1346(f) (1994). To foreclosure "stale challenges to the United States' claims[s] to real property, whatever the merits of those challenges," it includes a statute of limitations. *United States v. Mottaz,* 476 U.S. 834, 851, 106 S. Ct. 2224, 2234, 90 L. Ed. 2d 841, _____ (1986). That provision states, "Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. §2409a(g) (1994). It identifies "the date the

jurisdictional nature of QTA limitations. [12] *See Valley v. Rapides Parish Sch. Dist.*, 145 F. 3d 329, 331-32 (5th Cir. 1998) ("Subject matter jurisdiction can be raised at any time, even sua sponte."). Dismissal for lack of subject matter jurisdiction arises when "it appears certain that the plaintiff[s] cannot prove any set of facts in support of [their] claim which would entitle [them] to relief." *Hobbs v. Hawkins*, 968 F. 2d 471, 475 (5th Cir. 1992). Where the dismissal rests on the complaint and the undisputed facts, such as here, we decide the correctness of the district court's application of the law and whether or not the facts on which it relied were indeed undisputed. *See Williamson v. Tucker*, 645 F. 2d 404, 413 (5th Cir. 1983). Our review of the district court's application of the law is de novo. *See Ynclan v. Department of Air Force*, 943 F. 2d 1388, 1390 (5th Cir. 1990).

We conclude that this QTA action accrued more than twelve years before its commencement. FWNB learned about the United States' claim to the mineral interests in 1955, when it served, as

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12. Granting summary judgment is an appropriate way to effect a dismissal for lack of subject matter jurisdiction. *See Stanley v. Central Intelligence Agency*, 639 F. 2d 1146, 1157 (5th Cir. Unit B Mar. 1981) (finding a dismissal based on an exception to a waiver of sovereign immunity to implicate subject matter jurisdiction) ("Since the granting of a summary judgment is a disposition on the merits of the case, a motion for summary judgment is not the appropriate procedure for raising the defense of lack of subject matter jurisdiction").

75 L. Ed. 2d at _____ (holding that, if the suit was barred by the QTA's statute of limitations, then "the courts below had no jurisdiction to inquire into the merits").

Courts interpret the QTA "in accordance with principles of federal law." *Vincent Murphy Chevrolet Co. v. United States,* 766 F. 2d 449, 451 (10th Cir. 1985). "[W]hile [they]...may properly look to state law as an aid in determining the application of statutory language to specific facts, such state law should be '[c]ompatible with the purpose of [the legislation so as] to find the rule that will best effectuate federal policy.' " *Id.* Thus, state law may provide courts with insight about "ownership, transfer and title to real estate." *Amoco Prod. Co. v. United States,* 619 F. 2d 1383, 1387 (10th Cir. 1980); *see Prater v. United States,* 618 F. 2d 263, 263 (5th Cir. 1980) (holding plaintiff's evidence in QTA case "sufficient to establish the promise to reconvey, and thus raise a claim for equitable title [under Georgia trust law] for jurisdictional purposes"). It also may assist in discerning knowledge of the Government's claim. *See Amoco,* 619 F. 2d at 1387 ("Local practices and local rules are particularly indicative of whether a party should have known a relevant fact.").

We construe the district court's grant of summary judgment as a dismissal for lack of subject matter jurisdiction because of the

trustee under Langille's will, with a notice of the condemnation action. It consequently knew of the Government's adverse action in 1966, when McMullen Oil conveyed to FWNB, as trustee under Langille's will, any rights it held in the mineral interests. These facts operated to put Harris and the McMullens on notice of the Government's claim, given FWNB's authority to sue or defend on behalf of the Langille Trust and the absence of any conflict of interest between FWNB or Langille's children and them. *Cf. Towson v. Texas Elec. Serv. Co.*, 371 S.W. 2d 581, 582-83 (Tex. Civ App.—Eastland 1963, writ ref'd n.r.e) (applying doctrine of virtual representation in a state condemnation case). Harris and the McMullens, therefore, were aware of the Government's claim to the mineral interests at least thirty years before this suit was brought. This situation renders the present title challenge barred by the QTA's twelve-year limitations period.

IV.

Bank One, Harris' heirs and the McMullens also argue that the 1970 order was not a final judgment. We have resolved this issue already, agreeing with the district court. *See Bank One* at 2-4. We cannot revisit it; res judicata prevents us from doing so. *See* 5th Cir. R. 47. 5.4 ("Unpublished opinions issued on or after January 1, 1996,

are not precedent, except under the doctrine of res judicata...."); *United States v. Timmons*, 672 F. 2d 1373, 1377-78 (11th Cir. 1982) (finding res judicata to bind as to issue resolved in earlier case).

V.

We AFFIRM the dismissal of this case for the lack of jurisdiction.

# APPENDIX B

*Memorandum and Order* of the United States District Court for the Southern District of Texas, Laredo Division, filed July 11, 1997

Vol. 1, Dkt. 41

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**LAREDO DIVISION**

| | | |
|---|---|---|
| **BANK ONE, TEXAS, N.A., TRUSTEE, et al.,** | § | |
| | § | |
| **Plaintiffs,** | § | |
| | § | |
| **vs.** | § | **CIVIL ACTION** |
| | § | **NO. L-96-51** |
| **UNITED STATES OF AMERICA, et al.,** | § | |
| | § | |
| **Defendants.** | § | |

**MEMORANDUM AND ORDER**

Plaintiffs filed this action under the Quiet Title Act, 28 U.S.C. §2409a, to challenge the United States' title to a 1/16th mineral interest (hereinafter, "the 1/16th interest") in certain parcels of real property located in Zapata County, Texas. Defendant United States acquired title to the 1/16th interest by condemnation in 1950. Plaintiffs claim title to the 1/16th interest as successors-in-interest to a testamentary trust which, Plaintiffs claim, included the 1/16th interest despite the condemnation. Plaintiffs base their claim to title on the ground that neither they nor their predecessors-in-interest received the notice of the condemnation proceedings to which they were entitled under law. Pending before the Court is *United States'*

*Motion to Dismiss Second Amended Complaint* (Docket No. 31), filed December 16, 1996. Defendant argues that the Court lacks jurisdiction to hear Plaintiffs' claim because it was not brought within the twelve-year limitations period of the Quiet Title Act, 29 U.S.C. §2409a(g).

**Factual Background**

Susie McMullen Langille died in 1938. By her will she devised much of her estate to the Fort Worth National Bank (hereinafter "FWNB") as trustee. *Second Amended Complaint to Adjudicate Title to Real Property Pursuant to 28 U.S.C. §2409a* (Docket No. 29, Exhibit A at 3). Included in Langille's estate was the 1/16th interest, which Langille had acquired from her husband upon his death in 1934. Docket No. 29 at 6. Langille's will, vesting the trustee with "full and unrestricted power and authority," directed FWNB to make payments out of trust income and principal to Langille's two children for life. Docket No. 29, Exhibit A (hereinafter "Langille's will") at 8-9. The will further provided that upon the death of Langille's last surviving child, the trust (hereinafter, the "Langille Trust") would terminate and the principal "then remaining" would go to the "heirs of the body of my children," (hereinafter "Langille's grandchildren"). Id. at 9. The Langille Trust terminated

in December 1984 upon the death of Jeannie A. Hall, Langille's last surviving child.[1] *Plaintiffs' Response to United States' Motion for Summary Judgment* (Docket No. 10), filed August 5, 1996.

Plaintiff Bank One, Texas, N.A., is the trustee of the "Red Crest" Trust, a trust created by Langille's grandchildren from the assets of the Langille Trust that the grandchildren acquired when the Langille Trust terminated in 1984. Docket No. 29, at 10. The other Plaintiffs are Langille's grandchildren or their successors. Id.

In January 1950 the United States filed a declaration of condemnation in this Court and acquired, pursuant to the Declaration

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' Plaintiffs have amended their original factual allegations with their Second Amended Complaint. Plaintiffs now allege that Susie McMullen Langille's estate contained only &,royalty interest, not the full 1/16th mineral interest, and that several years earlier H.J. McMullen, Langille's husband, had conveyed the remainder of the 1/16th interest --rights to execute leases and receive bonus money and delay rentals to the McMullen Oil and Royalty Company (hereinafter the -Corporation"). Out of that conveyance to the Corporation, Plaintiffs allege, H.J. McMullen retained the right to receive royalties from the 1/16th interest for himself. Docket No. 29 at 5. Upon her husband's death, Plaintiffs allege, Langille acquired only her husband's right to royalties in the 1/1 16th interest. Id. at 6. She also acquired her husband's shares of stock in the Corporation, which became part of the principal of the Langille Trust upon her death. *Plaintiffs' Additional Authorities Filed in Response to Reply Briefs* of... *Defendants' Motions to Dismiss. . . (Docket* No. 36), filed January 22, 1997, at 3. Plaintiffs further allege that, upon the Corporation's dissolution In 1966, FWNB, as shareholder, acquired title to the Corporation ' 's portion of the 1/16th interest. Docket No. 29 at 8. Although they do not expressly allege such, Plaintiffs apparently claim that the trust inherited all the corporate stock, because they refer to no other potential owners to the stock and ultimately to the mineral interest.

of Taking Act, 40 U.S.C. §258a, fee simple title to over 85,000 acres of land in Zapata County, Texas. The condemnation action, Civil Action No. 529 (hereinafter "C.A. 529"), was commenced pursuant to plans to construct the Falcon Dam and Reservoir on the Rio Grande River. The 1/16th interest was included among the property condemned. Later, the United States offered to revest in the original owners the mineral rights in the condemned land. For the most part such mineral interests were revested, although Plaintiffs' predecessor's 1/16th interest was not. Plaintiffs now contend that the United States failed to provide their predecessor-in-interest with the notice required under law.

**Jurisdictional Question**

The prevailing view of §2409a(g) has been that it is jurisdictional in nature. Block v. North Dakota ex rel. Bd. of University of Sch. Lands, 103 S.Ct.1811 (1983); United States v. Mottaz, 106 S.Ct. 2224 (1986). Under this view, the timeliness of Plaintiffs' claim is an element of subject matter jurisdiction, and if Plaintiffs cannot prove that they brought this claim within twelve years after they or their "predecessor in interest knew or should have known of the claim of the United States" (28 U.S.C. §2409a(g)), the Court would be precluded from considering the merits of Plaintiffs'

claim.

The Ninth Circuit, however, recently held that the limitations period in the Act is not jurisdictional. In Fadem v. United States, 52 F.3d 202 (9th Cir. 1994), the court held that "the statements in *Block* and *Mottaz* that the QTA's statute of limitations is jurisdictional in nature have no continuing validity after the [Supreme] Court's decision in" Irwin v. Department of Veterans Affairs, 111 S.Ct. 453 (1990) (involving a discrimination claim under Title VII). Fadem, 52 F.3d at 206.[2] In Irwin, the Supreme Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." Id. at 457.

Fifth Circuit caselaw on this issue is unclear. Until very recently that court never explicitly ruled on this jurisdictional nature of §2409a(g). In Johnston v. United States, 85 F. 3d 217 (5th Cir. 1996), the Fifth Circuit had reaffirmed its holding in Houston v. United States Postal Serv., 823 F. 2d 896 (5th Cir. 1987), *cert denied,*

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[2]Contra Richmond, Fredrickburg & Potomac R. Co. v. United States, 945 F.2d 765 (4th Cir. 1991) (holding the twelve-year limitations period in 28 U.S.C. § 2409a(g) to be a jurisdictional prerequisite to suit against the United States, citing Block).

108 S. Ct. 1470, that the time limitations of the Federal Tort Claims Act, 28 U.S.C. § 2401 (b), are jurisdictional. Johnston, 85 F.3d at 218 n.2. However, the Fifth Circuit recently held in Beggerly v. U.S., N0. 95-60625, slip op. 3470, n.18(5th Cir. May 29, 1997), that "[e]quitable tolling may be applied against the United States, "citing Irwin.

This Court need not resolve the apparent inconsistencies because neither result saves Plaintiffs' claim for the requirements of §2409a(g). Even if §2409a(g) is nonjurisdictional and the absence of any basis for equitable tolling, untimeliness still would subject Plaintiffs to dismissal under Fed.R.Civ.P. 12 (b)(6). Defendant obviously has not waved a timeliness defense, and Plaintiffs make no showing of any reason why Defendant is estopped from doing so or why equitable tolling would apply under the facts of this case. Because of Beggerly, supra, the Court declines to consider the limitations issue under Rule 12(b)(1), but will address it as an affirmative defense raised by the Government.[3]

**The Trust Document**

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[3] The Rule 12 motion would thus initially lie under 12(b)(6). However, since both sides have alluded to matters not strictly within the pleadings, the ultimate vehicle for ruling is Fed. R. Civ. P. 56 Washington v Allstate Inc. Co., 901 F. 2d 1281, 1283-84 (5th Cir. 1990).

Langille's will, at p.3, bequeathed Langille's estate to FWNB "as Trustees in Trust." As trustee, FWNB held legal title to the property in the trust estate, and the income beneficiaries (Langille's children) acquired the equitable title to the property in trust. Langille expressly vested FWNB with considerable authority, including the power to litigate in behalf of the trust estate;

> I direct and authorize that my Trustee shall have and possess the following powers and authorities....:
> to defend all claims and causes of action asserted against the Trust property, or this Trust, or the interest of any beneficiary herein, and to settle and compromise for, and in behalf of this trust, and all beneficiaries of same, all claims, demands, and causes of action involving either the Trust property or the right, title, or interests of any beneficiaries therein, now in being or unborn; all of which said settlement and compromise as so made by said trustee, shall be made by the trustee acting upon its sole and exclusive direction and judgment, and when made, shall be binding upon all of the Trust Estate whether in being or unborn.

Langille's will at 3, 5-6. The will also expressly vested the trustee with the power to sell:

> I further authorize and direct that my Trustee shall have full power and authority to sell... any or all of the principal of the Trust Estate...when so often as it deems to be the best interest of the Trust Estate, and in accordance with its sole and exclusive judgment and direction.

Langille's will at 7. A trustee with the power to sell trust assets acquires fee simple title to the trust estate. Dulin v. Moore, 70 S.W. 742, 743 (1902), *citing* Potter v. Couch, 11 S. Ct. 1005, 1009 (1891). Thereafter Langille's will provided as follows:

> In addition to the powers and authorities herein expressly given to my Trustee, I hereby expressly authorize and empower [the trustee] to conduct and carry on the Trust Estate and transact any and all affairs and business incident thereto, fully clothing the Trustee with the full and unrestricted power and authority to act as fully as if I, myself, were acting, so that no question can ever be raised to the power and authority of my Trustee.

Langille's will at 8. That provision gave FWNB plenary authority to manage the trust assets at its exclusive discretion in order to carry out the intentions of the testator.

In addition to paying each of Langille's children one-half of the annual net income of the trust, the trustee was instructed to pay each child "a sum equivalent to three and one-third percent of the principal of the Trust estate herein created." Langille's will at 8. Langille's will also provided that up to one-half of the principal trust could be used for the "use and benefit of either of my children, in the event either or both of them need an additional sum...by virtue of illness, injury or physical disability." Langille's will at 9. Thus, the

trustee was required to convey out of the trust principal at least two-thirds, and possibly all, of the assets therein. To the extent the will created any interest in Langille's grandchildren, it was only in whatever principal of the Langille Trust was "then remaining" when the last of the Langille's children died. Langille's will at 9. Nowhere does Langille's will require the trustee to maintain the 1/16th interest for Langille's grandchildren or otherwise exclude the 1/16th interest from the operation of the powers and authorities of the trustee. The will never refers to the 1/16th separately from the rest of the trust estate nor does it guarantee that the 1/16th interest would remain when the trust terminated. Indeed, if both of Langille's children had become ill, it is conceivable that nothing would have remained of the Langille Trust principal when those beneficiaries died.

**Notice to the Trustee**

Under Fed.R.Civ.P. 71A(c)(2), the condemnor is required to add as defendants to a condemnation action, prior to a hearing on just compensation, "all persons having or claiming an interest in the property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired." As discussed above, FWNB held legal title to at least a 1/16th royalty interest as

trustee of the Langille Trust. The Court takes judicial notice of the *United States' Second Submission of Documents for Inclusion in Substitute Record* (C.A. 529, Docket No. 20), filed April 1, 1996. Attached thereto is a *Notice* and *Marshal's Return,*[4] indicating that a United States Deputy Marshal personally served a vice-president of FWNB with notice in C.A. 529 on December 22, 1955, more than six months before this Court awarded just compensation for the condemned property interests. [5] That notice complied with the requirements of Fed.R.Civ.P. 71A(c)(2) and was sufficient to inform its recipient that the United States was claiming an interest in property owned by the recipient.

The United States named and served the one party that held the legal title to the 1/16th interest. The December 22, 1955, noticed provided FWNB sufficient time to appear in C.A. 529. Though it

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[4] Plaintiffs do not challenge the validity of this evidence of notice to the trustee. They appear to rely on the fact that, while the notice informs its recipient of the existence of a condemnation action, it fails to explicitly inform the recipient of the Government's offer to revest. See *Plaintiffs' Response to United States' Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction...*(Docket No. 32), filed December 17, 1996, at 10. As the Court holds, *infra*, such a distinction is without significance —mere notice is sufficient. Moreover, a discussion of the evidence of notice to the trustee is noticeably absent from "Plaintiffs' Challenges to Factual Statements Which Appear In The Government's Rule 12 (b) Motion "Docket No. 32 at 11-19.

[5] See *Judgment Confirming Award of Special Commission and Report of Special Master*, C.A. 529, July 26, 1956.

was vested with the authority to defend causes of action against trust assets, FWNB did not appear in C.A.529. Upon receiving that notice, FWNB had a duty to inquire periodically into the status of the condemnation action. See Latham v. Wells Fargo Bank, 987 F. 2d 1199, 1201 (5th Cir. 1993); Robbins v. Amoco Production Co., 952 F. 2d 901, 908 (5th Cir. 1992). Such an inquiry would have revealed not only the initial condemnation facts, but also that the condemnor later offered to revest mineral rights in their former owners. Therefore, because Plaintiffs or their "predecessor in interest knew or should have known of the claim of the United States" in 1955, [6]the twelve-year limitations period in § 2409a(g) expired in this action in December 1967.

Even had the limitations period not expired, Plaintiffs' lack-of-notice claim would fail. Langille's grandchildren have no basis for claiming entitlement to personal notice in C.A. 529 because they could not have acted with respect to the 1/16th interest. Only the trustee had legal title to the 1/16th interest. Indeed, with no power to

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[6] FWNB changed its name to Texas American Bank/Fort Worth, N.A. ("TAB"), in 1982. Langille's grandchildren designated TAB the trustee of the Red Crest Trust in 1984. The Federal Deposit Insurance Corporation, as receiver, transferred the trust assets of TAB to Team Bank in 1989. Team Bank merged with Bank One, Texas, N.A., in 1992. Docket No. 29 at 10.

exercise authority over any property subject to condemnation in C.A. 529, Langille's grandchildren had no standing in C.A. 529. Consequently the trustee's failure to appear in C.A. 529 and seek a revestment of the 1/16th interest was binding on Langille's grandchildren. Any claim based on adverse consequences caused the beneficiaries by the trustee's nonappearance must be brought against the trustee, not against the United States.

**Trustee's Authority**

For over a century, it has been the law of this country that a trustee vested with full authority to handle trust matters "may represent his beneficiaries in all things relating to their common interest in the trust property" Kerrison v. Stewart, 93 U.S. 155, 160 (1876). The beneficiaries are not necessary parties to suits to enforce or defend the trust, and the trustee's actions will bind the beneficiaries. Id. Kerrison represents one of the many exceptions to the early rule of equity that the beneficiary of a trust was always a necessary party to a lawsuit relating to the trust. Slay v. Burnett Trust, 187 S.W. 2d 377, 382 (Tex. 1945). In Slay, the Texas Supreme Court relied on Kerrison in holding that, where a trust instrument broadly empowered the trustee unreasonably manifested

an intention to authorize the trustee to prosecute a lawsuit to collect profits, the trustee could do so in its own name without having to join the beneficiaries. Id. At 383. There was no conflict of interest between the trustee and the beneficiary, and the lawsuit "in no way affect[ed] the trustee's relation with the cestui que trust." Id. The Texas Supreme Court further developed the Slay holding in a later case attacking a will that created a trust. Applying the doctrine of virtual representation and Mason v Mason, 366 S.W 2d 552(Tex. 1963), the court held that the beneficiaries were considered to be adequately represented by a trustee with full power to manage the trust estate and otherwise empowered to defend the trust and to represent all interested parties. Id. at 554. Citing the Restatement on Trusts, the Mason court held that "beneficiary is a necessary party only if a complete determination of the controversy cannot be had unless he is a party." Id. Such a circumstance would arise if, for example, there were a conflict of interest between the trustee and beneficiary. Id.

A Texas appellate court considered the failure of a condemnor to join beneficiaries as parties in a condemnation proceeding Towson v Texas Elec. Serv. Co., 371 S.W. 2d 581 (Tex. Civ. App—Eastland 1963, writ ref'd n.r.e.). Relying on Slay and

Mason, the court held that a trust document that granted broad and unlimited powers to trustees reasonably manifested an intent to authorize the trustees to sue and be sued as such. Id. At 583. With no evidence of a conflict of interest between the beneficiaries and the trustees, the beneficiaries could not void the condemnation judgment to which the trustees had been parties. Id.

Other Texas cases in the Slay-Mason line indicate that two factors determine whether to except a case from the general equity rule; one, whether the suit involves a conflict of interest between the trustee and beneficiary or between multiple beneficiaries and, two, whether the trustee is empowered by the trust instrument to litigate on behalf of the trust estate.[7] Where there is no conflict of interest and where the trustee has been vested with authority to litigate (or been vested with broad powers from which the authority to litigate

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[7] See Smith v Wayman, 224 S.W. 2d 211, 217-218 (Tex. 1949); McDonald v. Alvis, 281 S.W. 2d 330, 331 (Tex. 1955); Whitsett v Whitsett, 201 S.W. 2d 114, 121 (Tex. Civ. App — Fort Worth 1947, writ dism's w.o.j.); Johnston v Stinson, 215 S.W. 2d 218, 223 (Tex. Civ. App. —Texarkana 1948, writ ref'd n.r.e.); Carter v DeJarnatt, 523 S.W. 2d 88, 91 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.); Dahl v Akin, 645 S.W. 2d 506, 530 (Tex. App.—Amarillo 1982), aff'd 661 S.W. 2d 911 (Tex. 1983); Citizens State Bank of Dickinson v Bowles, 663 S.W. 2d 845, 848 (Tex. App. —Houston [14 Dist.] 1983, writ dism'd w.o.j.); Hedley Feedlot, Inc. v Weatherly Trust, 855 S.W. 2d 826, 833 (Tex. App. — Amarillo 1993, writ denied); Starcrest Trust v Berry, 926 S.W. 2d 343, 355 (Tex. App. — Austin 1996, no writ)

can be inferred), the beneficiaries are not necessary and indispensable parties and cannot upset a prior judgment as void for their lack of participation.

In the instant case, Langille's grandchildren were not indispensable parties to the condemnation case. That case —as it relates to the Langille Trust—was essentially a formal, involuntary purchase of trust property at market value. It had no effect on the relationship between FWNB as trustee and Langille's grandchildren as beneficiaries.[8] There was no conflict of interest.[9] Further, FWNB

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[8] Despite their claims to the contrary, Langille's grandchildren were beneficiaries of die Langille Trust. Langille's children, having been named in the trust instrument and entitled to income from the trust estate, are designated "income beneficiaries." With an interest in tile principal of the trust estate upon its termination, the grandchildren are " remainder beneficiaries.-See Barcelo v Elliott, 923 S.W.2d 575, 576 (Tex. 1996); Wils v Robinson, 934 S.W.2d 774, 778 (Tex. App.--Houston [ 14th Dist.) 1996)-, Cleaver v Cleaver, 935 S.W.2d 491,493 (Tex. App.-Tyler 1996).

[9] Plaintiffs claim that because the 1/16th interest was a "non-productive" mineral interest when C.A. 529 commenced and because the purpose of the Langille Trust "was to generate income to be distributed to" Langille's grandchildren, a conflict of interest did exist between the Trustee and Langille's grandchildren. As Plaintiffs describe that conflict, FWNB would have had to have "expended attorney's fees in Civil Action No. 529, thereby decreasing the net income available for the beneficiaries of the Langille Trust, but benefitting [Langille's grandchildren], who were not named as parties.** *Plaintiffs' Brief and Response to United States' Rule 12(b)(1) Motion to Dismiss* ... (Docket No. 30), filed December 16, 1996, at 27.

This argument ignores the fact that FWNB had no duty to preserve trust assets for the benefit of the remainder beneficiaries, and it

as trustee had both plenary authority to act on the trust Estate and all matters and express authority to litigate on behalf of the trust. The court concludes, then, that even apart from any limitations issue, as to the royalty rights in the 1/16th interest,[10] Langille's grandchildren were bound by FWNB's action with regard to the 1/16th interest and their non-joinder is not a basis to void the final judgment in C.A. 529.[11]

**Plaintiff's Arguments**

As indicated in footnote 1, Plaintiffs now allege that a part of

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assumes that FWNB was an omniscient actor that would have known that the "non-productive" mineral interests in die 1950s would become productive, royalty-generating interests only in the 1990s, and not before then. The only -conflict" is one manufactured by Plaintiffs who, with the benefit of hindsight, now prefer that FWNB had appeared to seek revestment of the 1/16th interest. That this present preference is different from what happened in the 1950s does not create a conflict of interest.

The Court also notes that even to make this argument Plaintiffs must accept that Langille's grandchildren are beneficiaries of Langille's will. See supra note 4. Otherwise, any conflict between them and the trustee would be irrelevant.

[10] See supra note 1.

[11] This conclusion is not changed by the notice requirements of the Texas Trust Act. Tex. Prop. Code Ann. § 115.015, like its predecessor, Tex. Rev. Civ. Stat. Ann. art 7425b-19, requires that notice be served on beneficiaries in causes of action against a trustee on a contract executed by the trustee or for a tort committed in the course of the trustee's duties. C.A. 529 was neither of those types of cases.

the mineral interest came to the trust through a separate corporation, which should have been but was not served. The Government challenges that factual assertion but, even on the facts plead, Plaintiffs' claim would be barred by limitations. It is clear that FWNB had notice of C.A. 529 n 1955. At that time, it was a shareholder—if not the sole shareholder—of the Corporation. Then, in 1966, FWNB allegedly became the outright owner of the remainder of the 1/16th interest. FWNB was on notice that a condemnation action had been filed against the entire property many years earlier. It, therefore, had a duty to inquire further into the ramifications of that suit. The twelve-year limitations period on any claim would thus have expired in 1978.

There is no merit to Plaintiffs' claims that there has been no final judgment in C.A. 529. The Court's Memorandum and Order in C.A. 529, filed December 7, 1996, found that a final judgment had been entered in that case . Plaintiffs' reliance on that "defeasible title" language in Catlin v United States, 65 S. Ct. 631 (1945), is misplaced. See memorandum and Order, C.A. 529, filed January 30, 1997. Plaintiffs' argument that "all persons having an interest in property should be made parties defendant in a condemnation action" (Docket No. 30 at 28), citing 12 Wright & Miller §3045, is

inapposite. Langille's grandchildren, as noted above, had no interest in the 1/16th interest—only FWNB did.[12] Finally, Plaintiffs claim that Langille's grandchildren were entitled to notice of C.A. 529 under Tex. Rev. Civ. Stat. Ann. art. 1982. That section governs only suits against the estate of a decedent, which C.A. 529 wasn't, and ignores the supremacy of the Federal Rules of Civil Procedure in federal condemnation actions.

Accordingly, *United States' Motion to Dismiss Second Amended Complaint* (Docket No. 31) is **GRANTED.**

The following motions are hereby DENIED as moot:

(1) *United States' Motion for Summary Judgment* (Docket No. 7), filed July 15, 1996;

(2) *The Tesora Defenants' Motion to Dismiss or for Summary Judgment* (Docket No. 13), filed August 15, 1996;

(3) *Plaintiffs' Motion for Partial Summary Judgment*

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[12] The cite to Wright & Miller is also incomplete and therefore inaccurate. Because a condemnation is an action in rein there are no indispensable parties and the condemnor's title to land cannot defeated by failure to join. Id. An unjoined party merely retains the vested right to just compensation. Id. Even if Langille's grandchildren had an interest in the 1/1 16th interest entitling them to notice, their rights with respect to the condemnation of that interest were secured 1 1956 when die Court awarded $194.31 as just compensation. See *Judgment Confirming Award...*, supra note 4, at 17.

(Docket No. 20), filed November 4, 1996;

(4) *United States' Rule 12 (b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction* (Docket No. 25), filed November 26, 1996;

(5) *United States' Request for Evidentiary Hearing on Motions to Dismiss for the Lack of Subject Matter Jurisdiction* (Docket No. 27), filed November 29, 1996;

(6) *Transtexas Gas Corporation's Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted....*(Docket No. 33), filed December 18, 1996;

(7) Defendant Tesoro's *Motion to Dismiss or for Summary Judgment* (Docket No. 38), filed April 1, 1997.

DONE at Laredo, Texas this 11th day of July, 1997.

<Signed>
CHIEF UNITED STATES DISTRICT JUDGE

# APPENDIX C

*Order of Dismissal* from the United States DistrictCourt for the Southern District of Texas, Laredo Division, filed July 11, 1997

Vol. 1, Dkt. 42

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF TEXAS**

**LAREDO DIVISION**

| | | |
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| **BANK ONE, TEXAS, N.A., TRUSTEE, et al.,** | * | |
| **Plaintiffs,** | * | |
| **vs.** | * | **CIVIL ACTION NO. L-96-51** |
| **UNITED STATES OF AMERICA, et al.,** | * | |
| **Defendants.** | * | |

**ORDER OF DISMISSAL**

For the reasons stated in the memorandum and order of even date, it is ORDERED that this case be and the same hereby is DISMISSED

DONE at Laredo, Texas, this 11th day of July, 1997.

<Signed>

CHIEF UNITED STATES DISTRICT JUDGE

# APPENDIX D

*Memorandum and Order* of the United States District Court for the Southern District of Texas, Laredo Division, entered August 15, 1997

Vol. 1, Dkt. 47

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF TEXAS**

**LAREDO DIVISION**

| | | |
|---|---|---|
| **BANK ONE, TEXAS, N.A., TRUSTEE, et al.,** | * | |
| **Plaintiffs,** | * | |
| **vs.** | * | **CIVIL ACTION NO. L-96-51** |
| **UNITED STATES OF AMERICA, et al.,** | * | |
| **Defendants.** | * | |

## MEMORANDUM AND ORDER

Pending before the Court is Plaintiffs' motion and brief pursuant to Fed. R.. Civ. P. 59 (e) to alter or amend the court's memorandum and order of July 11, 1997 (Docket No. 43), filed July 24, 1997, and a motion for summary judgment (Docket No. 44), filed the next day. The motions largely repeat arguments Plaintiffs have made in several previous motions and briefs in

this case and in Civil Action No. 529. Some assertions are supported by nothing more than citations to allegations in Plaintiffs' Second Amended Complaint. In several instances, Plaintiffs have resubmitted verbatim paragraphs, on points explicitly addressed and rejected in the July 11 order, without any new discussion. [1]

One new, or at least reworked, claim is that Plaintiffs' title to the disputed mineral interest is vested in them by the doctrine of after-acquired title. Plaintiffs contend that, when the Government revested the mineral rights in other landowners, who were apparently the original grantors of the 1/16th mineral interest to the predecessor-in-interest to H.J. McMullen (Susie McMullen Langille's husband), the "first" 1/16th revested in the other landowners passed directly to H.J. McMullen and then to his heirs. Because the notion that the condemnation and subsequent revestment was a breach of warranty by Plaintiffs'

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[1] i.e., the trustee's conflict of interest, the applicability of Tex. Civ. Prac. Code Art. 1982, the entry of final judgment in Civil Action 529.

predecessor grantors is dubious at best, the Court is not convinced that the after-acquired doctrine has any applicability to this case. More importantly, if the doctrine does apply, it provides relief against those predecessor grantors, who are not parties to this case, and not the Government.

Three other points merit brief discussion. First, Plaintiffs claim that they are "unable to find" a deposit of the just compensation ordered for the 1/16th interest. True or not, this fact has no bearing on the limitations question or on quieting title to the 1/16th interest. While there is no indication that the Plaintiffs now desire such compensation, even of they did seek such relief, the Court cannot award it in an action brought under the Quiet Title Act, 28 U.S.C. 2490a. Second, Plaintiffs complain that the Court has dismissed defendants who have not moved for judgment. However, these defendants are only lessees from the Government so that a dismissal of the Quiet Title claim necessarily inures to their benefit. Third, Plaintiffs assert that the record does not support the contention

that either H.J. McMullen or Susie McMullen Langille owned all of the Corporation's stock. The Court assumed *arguendo* that Susie McMullen Langille, and subsequently her trust, owned all the stock and, therefore, succeeded to the Corporation's interest in the 1/16th mineral interest at issue. If that assumption is untrue, Plaintiffs' claim to be successors-in-interest to the 1/16th mineral interest is necessarily diluted. Plaintiffs' challenge to that assumption is curious, to say the least, first because it was for their benefit, and second because Docket No. 24 contains a document which memorializes a transfer of all the corporate stock owned by the Trust to the Corporation in return for all of the Corporation's mineral interests.

The main argument Plaintiffs pose is that they were unaware that the Court would treat the Government's motion to dismiss as one under Fed. R. Civ. P. 56. Specifically, they argue that had they known that the Court would so act, they would have sought to lift Magistrate Judge Notzon's August 14,

1996 order staying discovery in this case. Plaintiffs correctly state that when a motion to dismiss is converted to a motion for summary judgment under Rule 12(b), they are entitled to a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56". [2] However, Plaintiffs were not entitled to specific notice that the Court *would* treat the motion as one for summary judgment:

> Under Rule 56 it is not necessary that the district court give ten days' notice after it decides to treat a Rule 12(b)(6) motion as one for summary judgment, but rather after the parties receive notice that the court could properly treat such a motion as one for summary judgment because it has accepted for consideration on the motion matters outside the pleadings, the parties must have at least ten days before judgment is rendered in which to submit additional evidence.[3]

The Government's motion to dismiss (Docket No.25), filed November 26, 1996, contained three exhibits. Plaintiffs'

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[2] Fed. R. Civ. P. 12 (b)

[3] Isquith v. Middle S. Utils, 847 F.2d 186, 195-96 (5th Cir. 1988), *citing* Clark v. Tarrant County., 798 F. 2d 736, 746 (5th Cir. 1986)

responsive brief (Docket No. 30), filed December 12, 1996, requested that the Court take judicial notice of 13 documents Plaintiffs filed in their attempt to reopen Civil Action No. 529, together with the exhibits and appendices attached thereto. By filing such "extra-pleading" material, both parties implicitly invited the Court to convert the motion.[4] Because the Court accepted such material, the parties were on notice that the Court *could* convert the motion, and were not entitled to further notice that the Court *would* do so. The Court did not rule on the motion for another seven months. During this time, if Plaintiffs believed they needed more discovery, it was their right and responsibility to make that request. [5]

Moreover, even now Plaintiffs do not identify what other factual information would have any bearing on the Court's ruling. The facts which Plaintiffs themselves have recited in

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[4] To the extent Plaintiffs suggest that only the filing of an affidavit by the moving party triggers Rule 12(b) conversion provision, they are mistaken.

[5] *See* Fed. R. Civ. P. 56(1)

their various pleadings and motions are the same facts which this Court has assumed in its ruling. Even Plaintiffs newly filed summary judgment motion does not change the basic facts upon which the Court relied in concluding that this case should be dismissed.

It is also noteworthy that the Plaintiffs had responded to an August 1996 motion for summary judgment (Docket No. 13), based on the same limitations ground, filed by the self-styled "Tesora Defendants." Plaintiffs' response (Docket No. 17), filed a month later, urged the Court to take judicial notice of twelve of Plaintiffs' repetitive filings in Civil Action No. 529. For Plaintiffs to argue that it had no notice that the Court one Rule 12(b) motion to a Rule 56 motion when Plaintiffs had already responded to an essentially identical Rule 56 motion by another defendant is utterly frivolous.

Boiled down to their essence, the relevant facts of this case, upon which the Court ordered dismissal, are as follows:

1. the trustee acquired the royalty right in the

disputed mineral interest in 1938;

2. the trustee had plenary power to manage the trust assets, including the authority to sue and be sued on behalf of the trust;

3. the Government condemned the disputed mineral interest in 1950;

4. the condemnation was amended in 1952 to allow for revestment of mineral estates;

5. the trustee was served with notice of the condemnation in 1955;

6. the trustee did nothing in 1955, nor did the trustee do anything when it acquired the remainder of the disputed mineral interest from the Corporation in 1966, and only in 1996 was an action under the Quiet Title Act finally filed.

Accordingly, Plaintiffs' Rule 59(e) motion (Docket No. 43) is hereby DENIED, and Plaintiff's motion for summary judgment (Docket No. 44) is likewise DENIED.

DONE in Laredo, Texas, this 14th day of August, 1997.

<Signed>

CHIEF UNITED STATES DISTRICT JUDGE

# APPENDIX E

Order Denying Petition for Rehearing of the United States Court of Appeals for the Fifth Circuit, filed December 23, 1998

Fifth Circuit Order

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-41085

BANK ONE TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LILIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTON; JOHN H. MCMULLEN; ANDY J. MCMULLEN

Plaintiffs - Appelants

v.

UNITED STATES OF AMERICA, KCS RESOURCES INCORPORATED; TESORA EXPLORATION AND PRODUCTION COMPANY; TRANSTEXAS GAS CORPORATION; TESORA E&P COMPANY, Limited Partnership

Defendants - Appellees

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Appeal from the United States District Court for the Southern District of Texas, Laredo

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**ON PETITION FOR REHEARING**

Before REYNALDO G. GARZA, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

<Signed>
United States Circuit Judge

# APPENDIX F

*Second Amended Complaint to Adjudicate Title to Real Property Pursuant to 28 U.S.C. § 2409a*, together with the following attachments thereto (separated by cover pages):

Exhibit "A" - Will of Susie McMullen Langille

Exhibit "B" - Codicil to Will of Susie McMullen Langille

Exhibit "C" - Conveyance from H. J. McMullen to McMullen Oil & Royalty Company, Inc., dated November 19, 1928, which appears in Vol. 20, at p. 87 of the Deed Records of Zapata County, Texas

Exhibit 1 - Relevant Portions of *Amended Petition in Condemnation No. 3*

Exhibit 2 - Relevant Portions of *Amended Petition in Condemnation No. 12*

Exhibit 3 - Relevant Portions of *Offer to Lease and Lease for Oil and Gas* from United States Department of the Interior, Bureau of Land Management to Tesoro Exploration and Production Company, dated August 1, 1989

Vol. 2, Dkt. 29

**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**LAREDO DIVISION**

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| **BANK ONE, TEXAS, NATIONALASSOCIATION, TRUSTEE OF THE RED CREST TRUST;LELIA BEATRICE COX HARRIS; IINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN;JOHN H. MCMULLEN, JR. AND ANDY J. MCMULLEN,** | § | |
| **Plaintiffs** | § | |
| **V.** | § | **CIVIL ACTION NO. L-95-51** |
| **UNITED STATES OF AMERICA; TESORO EXPLORATION AND PRODUCTION COMPANY; COASTALOIL AND GAS CORPORATION; KCS RESOURCES, INC.; FALCON AIRCRAFT CONVERSIONS,INC; JAFFE ENERGY, INC.; ANR PRODUCTION COMPANY; TESORO E & P COMPANY, L.P.,A LIMITED PARTNERSHIP; AND TRANSTEXAS GAS CORPORATION,** | § | |
| **Defendants** | § | |

**SECOND AMENDED COMPLAINT TO ADJUDICATE TITLE TO REAL PROPERTY PURSUANT TO 28 U.S.C. § 2409a**

Bank One, Texas, National Association, Trustee of the Red Crest Trust ("Trustee"); Lelia Beatrice Cox Harris; Linda Harris Beard; Margie Harris Newtown; John McMullen, Jr. and Andy J. McMullen (collectively referred to as "Plaintiffs"), without waiving any pleading, motion or supplement filed by them as Movants in **Civil Action No. 529** in this Court styled ***United States of America, Plaintiff v. 85,237 Acres of Land, More or Less, in Zapata County, State of Texas, Flumencio Munoz, et al, Defendants*** ("Civil Action No. 529" herein), with leave of court having first been obtained, present this Second Amended Complaint against the United States of America ("the Government" herein); Tesoro Exploration and Production Company ("Tesoro" herein); Coastal Oil and Gas Corporation ("Coastal" herein); KCS Resources, Inc. ("KCS" herein); Falcon Aircraft Conversions, Inc. ("Falcon" herein); Jaffe Energy, Inc. ("Jaffe" herein); ANR Production Company ("ANR" herein); Tesoro E & P Company, L.P., a Limited Partnership ("Tesoro Partnership" herein); and TransTexas Gas Corporation ("TransTexas" herein). Tesoro, Coastal, KCS, Falcon, Jaffe, ANR, Tesoro

Partnership and TransTexas are jointly referred to herein as "the Oil Companies". The Oil Companies are made parties herein as individual corporations or a limited partnership, and as entities acting as managing/general partners of mineral production partnerships or joint ventures ("operating groups"), formed pursuant to various operating agreements, conducting mineral production operations on lands which are the subject of this Second Amended Complaint and/or on lands which are pooled with the subject lands. Plaintiffs would respectfully show the Court the following:

**Statement of Jurisdiction**

1. This Court has jurisdiction of the subject matter of this Second Amended Complaint and over the Government by the authority of 28 U.S.C. § 2409a, "Real Property Quiet Title Actions". This is an action to adjudicate disputed title to real property in which the Government claims an interest. The lands which are the subjects of this action are located in Zapata County, Texas, within the Southern District of Texas and the Laredo Division thereof. The interests claimed by the Government in the subject lands, being 1/16 mineral interests, are the subjects of one or more oil and gas leases from the Government, under which one or more of the Oil

Companies, as individual corporations or a limited partnership and/or as managing/general partners of operating groups, and perhaps other producers, are engaged in mineral production from wells on the subject lands, and on lands pooled therewith.

**Service of Summons**

2. The Government, Tesoro, Coastal and KCS have each filed an Answer herein.

3. Falcon's corporate charter has been revoked. Falcon may be served by delivering a copy of the summons and this Second Amended Complaint to its former president Morris Jaffe, Jr. at 1770 Sky Place Blvd., San Antonio, TX 78216 and to its registered agent, Patricia Pozza, at 1770 Sky Place Blvd., San Antonio, TX 78216. Jaffe may be served by delivering a copy of the summons and this Second Amended Complaint to its registered agent in the State of Texas, Patricia Pozza, at 1770 Sky Place Blvd., San Antonio, TX 78216. ANR may be served by delivering a copy of the summons and this Second Amended Complaint to its registered agent in the State of Texas, CT Corporation System, 811 Dallas Avenue, Houston, TX 77002. Tesoro Partnership may be served by delivering a copy of the summons and this Second Amended Complaint to its registered agent

in the State of Texas, C T Corporation System, 811 Dallas Avenue, Houston TX 77002. TransTexas may be served by delivering a copy of the summons and this Second Amended Complaint to its registered agent in the State of Texas, Edwin B. Donahue, 1300 East North Belt, Suite 300, Houston, TX 77032.

**The Subject Parcels**

4. The lands in which Trustee presently claim a 1/16 mineral interest, which are the subjects of this Second Amended Complaint, are herein referred to as "the subject parcels".

**Identification of Property in Which Plaintiffs Claim an Interest**

5. The following is a listing of the subject parcels. They are all included in the lands which are the subject of Amended Petition in Condemnation No. 3, as supplemented by Amended Petitions in Condemnation Nos. 4 through 14 (specifically Amended Petition in Condemnation No. 12, Paragraph 1, filed March 6, 1956) in Civil Action No. 529:

| Number assigned to parcel in Civil Action No. 529 | Number of acres in parcel | Location within Porciones 14, 15, 16 & 17 in Zapata Co. |
|---|---|---|
| Z-27-A | 225.521 | all of Share No. 28-A |

| | | |
|---|---|---|
| Z-30-A | 286.889 | Share No. 21 |
| Z-32-A | 286.883 | Share No. 21 |
| Z-32-A | 122.94 | Share No. 20 |
| Z-36-A | 10.750 | Share No. 39 |
| Z-37-A | 58.206 | Share No. 26 |
| Z-54.1-A1 | 27.420 | Share No. 23 |
| Z-54.1-A2 | 69.080 | Share No. 23 |
| Z-54-2-A | 144.780 | Share No. 23 |
| Z-62-A | 137.917 | Share No. 18A |

**Statement of the Nature and Extent of the Interest Claimed by Plaintiffs**

6. In 1926, Judgment was entered by the 49th District Court of Zapata County, Texas, partitioning Porciones 14, 15, 16 and 17 into shares. Shortly after the partition, the owners of the following shares conveyed a 1/16 mineral interest in each of the following shares to M.J. Raymond, a Laredo attorney, apparently in payment for legal services.

| Share No. | Allottee | Acres | Zapata Co. Deed Records |
|---|---|---|---|
| 5-A | Avelino Guerra | 949.548 | Vol. 18, pp 119-120 |
| 28-A | Eduardo Yzaguirre | 225.52 | Vol. 17, pp 231-232 |

| | | | |
|---|---|---|---|
| 29-A | Manuel Yzaguirre | 225.58 | Vol. 17, pp 231-232 |
| 39 | Patricio Garza Canales and wife, Francisca R. de Garza Canales | 87.00 | Vol. 17, p 230 |
| 23 | Avelardo Ramirez | 322.724 | Vol. 17, pp 79-80 |
| 20 | Herminio Guerra | 408.081 | Vol. 17, pp 80-81 |
| 21 | Francisco R. Saenz | 379.383 | Vol. 17, p 231 |
| 26 | Jose Ramirez | 272.786 | Vol. 17, p 79 |
| 18-A | Remigio Guerra | 469.657 | Vol. 17, pp 78-79 |

All of the above conveyances were in the form of general warranty deeds.

7. By Mineral Deed dated April 15, 1927, recorded in Volume 18, Pages 126-127, Deed Records, Zapata County, M.J. Raymond conveyed to H.J. McMullen the undivided 1/16 interest in the mineral estates conveyed to him in the above shares. This conveyance was also in the form of a general warranty deed.

8. In 1928, H. J. McMullen executed a conveyance to McMullen Oil & Royalty Company, Inc. ("the Corporation" herein), a copy of which is Exhibit "C" hereto. This conveyance provides that its purpose and intention is

> to entirely divest H. J. McMullen of all right or control over the oil, gas or other minerals in the property described in this instrument, save and except the right to receive the royalty oil, gas and other minerals, or the moneys payable from the sale thereof, and it is the purpose and intention of this instrument to vest in McMullen Oil & Royalty Company, Inc., the full right, in its own name to execute oil, gas and mining leases on the oil, gas or minerals interest or land now or hereafter owned by H. J. McMullen or standing in his name, in Zapata County, to such persons, firms or corporations as it may deem best and on such terms and for such bonus moneys and delay rentals as it may deem best, and that all such cash payments, bonus moneys and delay rentals shall be paid to McMullen Oil & Royalty Company, Inc., and H. J. McMullen, his heirs, representatives and assigns shall never have any interest therein nor in any way be entitled to any part thereof.

9. H.J. McMullen died in 1934, leaving a will which was probated, which left his assets to Susie McMullen, his widow.

**The Condemnation of Lands for Falcon Dam and Reservoir**

10. On December 29, 1949, the Government filed its Original Petition in Condemnation in Civil Action No. 529, in order to condemn certain lands located in Zapata County, Texas, for the purpose of constructing Falcon Dam and Reservoir - Rio Grande International Dams Project on the Rio Grande. Congressional authorization for the condemnation appears at 22 U.S.C. § 277.

Specifically § 277c authorized the Government to take, by the exercise of its power of eminent domain, property which may be necessary for the construction and operation of Falcon Dam and its Reservoir. The Original Petition in Condemnation included parcels out of lands which were subjects of the conveyance to H.J. McMullen by M.J. Raymond.

**No Notice of the Condemnation Was Served on the Corporation**

11. The Corporation was named as a defendant by the Government in the Condemnation Action, as an owner of the subject parcels. The Corporation was never dismissed as a Defendant. Although it was listed as being a Texas Corporation, with its office located in Fort Worth, Texas, the Corporation was never served with notice of the Condemnation Action.

**Non-joinder of, and No Notice to, Remaindermen of Susie McMullen Langille Will**

12. Susie McMullen Langille, the widow of H.J. McMullen, left a Will dated October 20, 1938, and a Codicil to said Will dated November 3, 1938. Copies of the Will and Codicil ("the Langille Will" herein) are attached hereto as Exhibits "A" and "B" and incorporated herein by reference. Upon the death of Susie McMullen

Langille, the Will and Codicil were duly admitted to probate; and they appear at Volume 191, page 313 of the Probate Minutes of Tarrant County, Texas. The Langille Will provided for the creation of a testamentary trust ("the Langille Trust" herein) to be administered by The Fort Worth National Bank of Fort Worth, Texas.

Provision III. I, appearing on page 9 of the Will provides:

> At the death of the survivor of my children, one or both of them surviving me, then this Trust Estate shall terminate and the principal of the Trust Estate then remaining in the control of the Trustee, shall be delivered and paid over to the heirs of the body of my children, per stirpes and not per capita.

13. Upon the probate of the Langille Will, the heirs of the body of the children of Susie McMullen Langille were vested with a remainder interest in the subject parcels. Upon the death of Mrs. Paul Bowden, a/k/a Jeannie A. Hall (the last surviving child of Susie McMullen Langille), the heirs of the body of the children of Susie McMullen Langille were entitled to possession and enjoyment of the 1/16 mineral interest in the subject parcels free of trust. Such heirs ("Remaindermen" herein) and their interests were as follows: Glenn Harris, Jr., one-half (l/2); John H. McMullen, Jr., one-fourth (1/4);

and Andy J. McMullen, one-fourth (1/4). Remaindermen were all of Susie McMullen Langille's grandchildren.

14. The executive right and the right to receive bonuses and delay rentals from the subject parcels were owned by the Corporation from 1928 until the Corporation was dissolved in 1966. At that time (the dissolution), the remainder interests in what had been the Corporation's rights in the subject parcels vested directly in Remaindermen. Then, so long as a child of Susie McMullen Langille survived, possession and the right to present enjoyment of the executive right and the right to receive bonuses and delay rentals in the subject parcels were in the Langille Trust. Upon the termination of the Langille Trust, possession and the right to present enjoyment of the executive right and the right to receive bonuses and delay rentals in the subject parcels were in Remaindermen.

15. Rule 71A(c) Fed. R. Civ. P. provides, in part:

> Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of

> the property involved and the interests to be acquired, and also those whose names have otherwise been learned.

16. Rule 71A(d)(1) Fed. R. Civ. P. provides, in part "Additional notices directed to defendants subsequently added shall be so delivered."

17. Remaindermen were so identified as a class in the Susie McMullen Langille Will.

18. Rule 17(a), Fed. R. Civ. P. provides that the trustee of an express trust may sue in the name of the Trustee, without joining the party for whose benefit the action is brought.

19. However, Rule 17(b), Fed. R. Civ. P. provides that capacity **to be sued** shall be determined by the law of the state of the individual's domicile or in which the district court is held. All Remaindermen were domiciled in the State of Texas.

20. At the time of the commencement of Civil Action No. 529, *Texas Revised Civil Statute Ann. 1982*, entitled *For Lands Against Decedents*, provided:

> In every suit against the estate of a decedent involving the title to real estate, the executor or administrator, if any, and the heirs shall be made parties defendant. [Acts 1925, S.B. 84]

This same language is now *V.T.C.A. Civil Practice & Remedies Code* § 17.002. This principal has

been a part of the statutory law of Texas since *Acts 1870*, page 173.

21. In this statute, the term "heirs", by judicial construction, has been determined to include devisees. *Grohn v. Marquardt*, 487 S.W.2d 214, 217 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e.).

22. The failure to comply with *Article 1982* in Civil Action No. 529, which named Susie McMullen Langille as a party, subjected the condemnation proceedings to subsequent attack by Remaindermen. *Lowman v. Falsetti*, 335 F.2d 632, 638 (5th Cir. 1964) certiorari denied, 379 U.S. 966; *Jones v. Gibbs*, 133 Tex. 645, 130 S.W.2d 274, 275 (1939); *Allen v. Matthews*, 210 S.W.2d 849, 581 (Tex. Civ. App.-Austin 1948, writ ref'd n.r.e.), finding judgment void; *East v. Duff*, 79 Tex. 329, 15 S.W. 273, 275 (1891).

23. John H. McMullen, Jr. was born in 1944. Andy J. McMullen was born in 1948.

24. Two of the Remaindermen were minors. Rule 17(c), Fed. R. Civ. P. provides in part:

The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall

make such other order as it deems proper for the protection of the infant or incompetent person.

Rule 55(b)(2), Fed. R. Civ. P. provides in part:

> . . . no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein (emphasis supplied).

No one appeared on their behalf in Civil Action No. 529. Interestingly, Rule 55(c),

Fed. R. Civ. P. provides as follows:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

25. Lelia Beatrice Cox Harris, Linda Harris Beard and Margie Harris Newtown are the widow and children, respectively, of Glenn Harris Jr., who died after December, 1984. Glenn Harris, Jr., John H. McMullen, Jr., and Andy J. McMullen were the settlors of Red Crest Trust. The Settlors transferred all mineral and royalty interests formerly in the Langille Trust to Texas American Bank/Fort Worth, N.A., as Trustee of the newly created Red Crest Trust. In 1989, the Federal Deposit Insurance Corporation, as receiver,

transferred the trust assets of Texas American Bank/Fort Worth, N.A. to Team Bank. Team Bank merged into Bank One, Texas, National Association in 1992. Accordingly, Bank One, Texas, National Association is the duly constituted Trustee of the Red Crest Trust. Therefore, all of Plaintiffs stand in the position of Remaindermen under the Will of Susie McMullen Langille.

26. Remaindermen were not named as parties in Civil Action No. 529, received no notice of the condemnation action, nor was a guardian ad litem or attorney ad litem appointed by the Court to represent their interests in Civil Action No. 529. They also had no notice of their right of election to retain their oil and gas interests under the subject parcels, as created by the Government's Amended Petition in Condemnation No. 3, as supplemented by the Government's Amended Petitions in Condemnation Nos. 4 through 14 (specifically Paragraph 1 of Amended Petition in Condemnation No. 12, filed March 6, 1956) in Civil Action No. 529. Rule 71A(f) of the Fed. R. Civ. P. required that the heirs of the body of the children of Susie McMullen Langille be given notice of the filing of the Amended Petitions in Condemnation in Civil Action No. 529, which provided for their right of election to retain their oil and gas interest

under the subject parcels.

27. Such right of election was never withdrawn by the Government, never dismissed by the Court or the Government, and never made the subject of a final judgment.

28. Therefore, Plaintiffs are entitled to file answer and to exercise their right of election to retain the oil and gas interests under the subject parcels in Civil Action No. 529, which they have done. *Klugh v. United States*, 588 F.2d 45 (4th Cir. 1978); *Klugh v. United States*, 818 F.2d 294, 301 (4th Cir. 1987).

**Revestitures of the Oil and Gas of the Subject Parcels and of the Mineral Estates of Certain Sub-Parcels**

29. The Secretary of State of the United States of America did not intend to ultimately vest title to the mineral estates for the subject parcels in the Government. The plan was for the mineral estates to be revested in their owners, once construction of the Falcon Dam and Reservoir was completed. This would assure that drilling operations would not conflict with the construction of the Dam and Reservoir. This would also "protect the Government against speculation in lands required for the Reservoir, enhanced in value by exploration and development." Such revesting in the owners of the

mineral estates of the subject parcels would also then be subject to limitations on drilling operations, such limitations taking the form of a negative easement in favor of the Government.

30. Appearing on page 4 of United States' Reply Brief in Support of Motion for Summary Judgment in this cause, the Government sets out the following unambiguous statement of legal position:

> After the filing of the Declaration of Taking No. 1, the International Boundary and Water Commission reevaluated the project plans and revised its property acquisition requirements. During this process it was decided that it would be sufficient to take a fee simple title up to the 307 foot contour elevation instead of the original 325 foot contour elevation. As a result, the government filed its Amended Petition in Condemnation No. 3 on January 16, 1952. The tract descriptions in this pleading were somewhat different than the descriptions in the original petition and it described the interest being taken below the 307 foot contour as follows:
>
> > the fee simple estate, provided, however, that the owners of the oil and gas in and under said tracts may, at their election, retain title to said oil and gas, subject to the terms of the negative easement prohibiting the drilling or deepening of any well for the purpose of producing oil and/or gas, provided, however, that exploration and development of oil and/or gas

> under said lands will be permitted by directional drilling from locations above the 325 ft. elevation traverse, acquired by Declarations of Taking Nos. 2 and 3.

Under *Catlin v. United States*, 324 U.S. 229, 241 (1945), the Government was only claiming defeasible title to the subject parcels, prior to the time that it filed its Amended Petition in Condemnation No. 3, which diminished the area of taking to that lying below the 307 foot contour elevation. Therefore, the Government's Amended Petition in Condemnation No. 3 removed lands at and above the 307-foot contour elevation from Civil Action No. 529. Trustee is therefore vested with title to its 1/16 mineral interest in lands located in the subject parcels which lie at and above the 307-foot contour elevation.

31. The following Sub-Parcels are located within the area situated between the 307 foot contour elevation and the 325 foot contour elevation. Such Sub-Parcels were surveyed and denominated by the United States of America and are referred to herein as Plaintiffs' Sub-Parcels:

| | | |
|---|---|---|
| No. 27.1F | | 1.82 acres, out of Share No. 28-A |
| No. 27.2F | (referred to as 27.3-F in Judgment of Revestiture) | 6.52 acres, out of Share No. 28-A |
| No. 30-F | | 56.00 acres, out of Share No. 21 |
| No. 32.1-F | | 4.43 acres, out of Share No. 20 |
| No. 32.2-F | | 25.81 acres, out of Share No. 20 |
| No. 36-F | | 3.00 acres, out of Share No. 39 |
| No. 37.1F | | 2.28 acres, out of Share No. 26 |
| No. 37.2-F | | 16.07 acres, out of Share No. 26 |
| No. 54.1-F | | 6.54 acres, out of Share No. 23 |
| No. 54.2-F | | 4.29 acres, out of Share No. 23 (consists of 2.14 acres out of Parcel Z-54.1-A2 and 2.15 acres out of Parcel Z-54.2-A) |
| No. 54.3-F | | 16.91 acres, out of Share No. 23 |
| No. 62-F | | 41.98 acres, out of Share No. 18A |
| No. 30-R | | 127.79 acres, out of Share No. 21 |
| No. 32-R | | 289.28 acres, out of Share No. 20 |
| No. 36-R | | 93.98 acres, out of Share No. 39 |
| No. 37-R | | 224.66 acres, out of Share No. 26 |
| No. 54-R | | 100.93 acres, out of Share No. 23 |
| No. 62.1-R | | 401.34 acres, out of Share No. 18A |
| No. 62.2-R | | 2.52 acres, out of Share No. 18A |

32. The notice by publication, which was published in three (3) issues of the *Zapata County News* in March of 1956, contains a provision 15, which provided for a perpetual easement "to prohibit the production of oil and/or gas from existing wells, provided, however, that exploration and development of oil and/or gas under said lands will be permitted by directional drilling from

locations above the 307-foot elevation traverse;". This provision 15 of the Notice by Publication included specific references by parcel numbers to all of the subject parcels.

33. True to the Government's original intention, Parcels Z-27-A, Z-30-A, Z-32-A, Z-36-A, Z-37-A, Z-54.1-A1, Z-54.1-A2, Z-54.2-A and Z-62-A were the subjects of Stipulations and Final Judgments upon Stipulations, pursuant to 40 U.S.C. § 258f. As explained above, the heirs of the body of the children of Susie McMullen Langille never received notice of Civil Action No. 529 and never made appearance therein. However, as to each of the subject parcels, Stipulations were entered into between the Government and individuals having an obligation to H.J. McMullen, his heirs and assigns, to warrant and defend title to the 1/16 mineral interests in the subject parcels. Specifically, the Stipulations were entered into between the Government and the grantors to M.J. Raymond of the 1/16th mineral interests in the subject parcels, or such grantors heirs/devisees.

34. The Judgments upon such Stipulations found that oil and gas would be excepted from condemnation, but provided for a negative easement in favor of the Government to control the methods

of drilling or deepening of any well for the purpose of producing oil and/or gas. The negative easement basically permitted directional (slant) drilling. Certain of the Judgments upon such Stipulations revested the mineral estates of portions (sub-parcels) of certain of the subject parcels in their former owners in fee simple (such revested sub-parcels being located between the 307 and 325 feet contour elevations).

35. The Judgments of Revestiture and the "Doctrine of After-Acquired Title" effectively revested the heirs, successors and assigns of H. J. McMullen with their 1/16 mineral interests in parcels Z-27-A, Z-30-A, Z-32-A, Z-36-A, Z-37-A, Z-54.1-A1, Z-54.1-A2, Z-54.2-A and Z-62-A.

**Defects in the Government's Claim**

36. The prior judgments entered by this Court in Civil Action No. 529, which incorporated The Map described in the next paragraph, and the Doctrine of After-Acquired Title revested the heirs, successors and assigns of H. J. McMullen with their 1/16 mineral interests in the subject parcels.

37. The United States Commissioner of the International Boundary and Water Commission, United States and Mexico, acting

for and on behalf of the Secretary of State of the United States of America, pursuant to Public Notice 131; Delegation of Authority 73, dated October 19, 1953, filed October 27, 1953; F.R. Doc 53-9101, amended Declaration of Taking No. 1 in Civil Action No. 529 by filing a map entitled Supplement-4 to Exhibit C to Declaration of Taking No. 1 ("The Map"). Appearing in the legend portion of The Map, in the upper left corner, is the following:

TRACT 1 - The estate taken for the public uses, in connection with the Rio Grande International Dams Project - Falcon Reservoir, in the lands designated Tract 1 is the fee simple title, save and except oil and gas, and subject to the existing rights to operate and maintain irrigation works serving lands lying above the 307-foot elevation traverse.

TRACT 2 - The estate taken for said public uses in the lands designated Tract 2 is the perpetual easement for operation and maintenance of Falcon Reservoir, including the right of ingress, egress, and regress, and the fight to overflow said lands and burden the same with every effect incidental to or in consequence of such overflow up to elevation 314 feet sea level datum.

TRACT 3 - Title to be revested in former owners subject to existing easements for public utilities and public highways.

TRACT 4 - Acquired for Relocation of Highway U.S.

83 and conveyed, by deed to the State of Texas.

The following sub-parcels, which are the subjects of Plaintiffs' Election to retain their oil and gas interests, appear on The Map:

TRACT 1. Those Sub-Parcels vested in the Government in fee simple, **save and except oil and gas:**

| | |
|---|---|
| No. 27 | 217.181 acres |
| No. 30.1 | 144.280 acres |
| No. 30.2 | 51.313 acres |
| No. 32 | 88.56 acres |
| No. 37 | 29.776 acres |
| No. 54.1 | 183.08 acres (Consists of 40.46 acres out of Parcel Z-54.1-A2 and 142.63 acres out of Parcel Z-54.2-A) |
| No. 62.1 | 15.698 acres |
| No. 62.2 | 7.819 acres |

TRACT 2. Those Sub-Parcels revested in the former owners, subject to Flood Easement:

| | |
|---|---|
| No. 27.1F | 1.82 acres |
| No. 27.2F (referred to as 27.3-F in Judgment of Revestiture) | 6.52 acres |
| No. 30-F | 56.00 acres |
| No. 32.1-F | 4.43 acres |
| No. 32.2-F | 25.81 acres |
| No. 36-F | 3.00 acres |
| No. 37.1F | 2.28 acres |
| No. 37.2-F | 16.07 acres |
| No. 54.1-F | 16.54 acres |
| No. 54.2-F | 4.29 acres (Consists of 2.14 acres out of Parcel Z-54.1-A2 and 2.15 acres out of Parcel 54.2-A) |
| No. 54.3-F | 16.91 acres |

| | |
|---|---|
| No. 62-F | 41.98 acres |

TRACT 3. Those Sub-Parcels revested in former owners, subject only to existing highway and utility easements:

| | |
|---|---|
| No. 30-R | 127.79 acres |
| No. 32-R | 289.28 acres |
| No. 36-R | 93.98 acres |
| No. 37-R | 224.66 acres |
| No. 54-R | 100.93 acres |
| No. 62.1-R | 401.34 acres |
| No. 62.2-R | 2.52 acres |

38. The Map is referred to by volume and page in item 15 of the Notice which was published in the *Zapata County News* on March 15, 22, and 29, 1956. The Map is referred to by volume and page in Judgments on Stipulation-Exclusion for all of the subject parcels.

39. All actions taken in Civil Action No. 529 which relate to the interests of the Corporation and of the heirs of the body of the children of Susie McMullen Langille, and which relate to the valuation of their interests in such parcels, are void as being violative of their rights to due process and equal protection under the Fifth Amendment to the United States Constitution because they received no notice of such proceedings.

40. Because the Corporation and the heirs of the body of the children of Susie McMullen Langille did not receive notice in Civil

Action No. 529, they did not have the opportunity to defend against the taking of the 1/16 mineral interests in the subject parcels on the grounds that such taking was the result of an abuse of discretion in that the means utilized by the Government in acquiring the 1/16 mineral interests were utilized in bad faith or were arbitrary or capricious.

41. The Government's taking of the 1/16 mineral interests in the subject parcels was the result of an abuse of discretion in that the means utilized by the Government in acquiring the 1/16 mineral interests were utilized in bad faith or were arbitrary or capricious.

42. Because the Corporation and the heirs of the body of the children of Susie McMullen Langille did not receive notice in Civil Action No. 529, they did not have the opportunity to defend against the Government's taking of the 1/16 mineral interests in the subject parcels on the grounds that such taking was not necessary for the construction and operation of Falcon Dam and its Reservoir.

43. The Government's taking of the 1/16 mineral interests in the subject parcels was not necessary for the construction and operation of Falcon Dam and its Reservoir; and, therefore, exceeded the statutory authority granted to the Government to exercise its

power of eminent domain.

44. The failure of the Government to revest in the heirs, successors and assigns of H. J. McMullen, if the Government did fail to revest, the 1/16 mineral interests when it revested 15/16 of the oil and gas in the other owners or when it revested sub-parcels in fee violated the Corporation and Remaindermen's rights to equal protection and due process under the Fifth Amendment of the United States Constitution .

45. Because neither the Corporation nor Remaindermen received notice in Civil Action No. 529, they did not have an opportunity to present evidence as to the values of their interests in the subject parcels, in violation of their rights to due process and equal protection under the Fifth Amendment to the United States Constitution. Neither a guardian ad litem nor an attorney ad litem was appointed in Civil Action No. 529 to represent and protect the interest of the heirs of the body

of the children of Susie McMullen Langille.

46. The right of election stipulated to in Civil Action No. 529 in the Government's amended petitions in condemnation, by an officer acting at the direction of the Attorney General, named H. J.

McMullen, Susie McMullen Langille, and the Corporation as individuals or a party who were entitled to revestment of oil and gas in the subject parcels. Such stipulation occurred in behalf of the United States. Although the Fort Worth National Bank, the Corporation and Remaindermen were entitled to receive notice of such right of revestment in accordance with Fed. R. Civ. P. 71A(f) and (d) and *Article 1982, Texas Revised Statutes*, no such notice was given to any of them. Although no such notice was ever given, the Government subsequently advised the Court that no stipulations were being presented as to the 1/16th interest in the oil, gas and other minerals claimed by the heirs, successors and assigns of H. J. McMullen in the subject parcels (Judgment Confirming Award in Civil Action No. 529, page 5). The Government proceeded to revest all interests in the oil and gas in the subject parcels, except the 1/16 mineral interest claimed by the heirs, successors and assigns of H. J. McMullen. Therefore, the conduct of the Government relating to the heirs, successors and assigns of H. J. McMullen's interest in the subject parcels was arbitrary and capricious. The Government's actions were without adequate determining principle and were unreasoned. The facts suggest actual malevolence by the Government

toward the Corporation; the Fort Worth National Bank, as a fiduciary; and Remaindermen. The actions of the Government relating to the heirs, successors and assigns of H. J. McMullen's interest in the subject parcels were in bad faith. *United States v. Carmack*, 329 U.S. 230, 243 (1946); *United States v. 49.79 Acres of Land*, 582 F.Supp. 368 (D. Del. 1983); United States v. 40.75 Acres of Land, 76 F.Supp. 239, 249 (N.D. Il. 1948).

47. Plaintiffs, in accordance with Paragraph 4 of Amended Petition in Condemnation No. 3, as supplemented by Amended Petitions in Condemnation Nos. 4 through 14 (specifically Paragraph 1 of Amended Petition in Condemnation No. 12, filed March 6, 1956) in Civil Action No. 529 and The Map, elected in such Civil Action No. 529 to retain the oil and gas in and under the subject parcels.

**Plaintiffs' Election to Retain Their Oil and Gas in the Subject Parcels**

48. Plaintiffs have elected to retain title to the oil and gas in the subject parcels, in accordance with Paragraph 4 of the Amended Petition in Condemnation No. 3, as supplemented by Amended Petitions in Condemnation Nos. 4 through 14 (specifically Paragraph 1 of Amended Petition in Condemnation No. 12), in Civil Action No.

529 and The Map; and Plaintiffs have directed that title to such oil and gas is to be vested in Bank One, Texas, National Association, Trustee of the Red Crest Trust. A copy of Amended Petition in Condemnation No. 3, including Exhibit "A" and Exhibit "B" thereto, is attached hereto as Exhibit "1" to this pleading. A copy of the relevant portions of Amended Petition in Condemnation No. 12 is attached hereto as Exhibit "2" to this pleading. Exhibits "1" and "2" are incorporated herein by reference.

**No Final Judgment Was Entered in Civil Action No. 529**

49. Plaintiffs were and are entitled to exercise their vested right of election to retain oil and gas in the subject parcels because no final judgment has been entered in Civil Action No. 529.

**Accrual of This Cause of Action**

50. This cause of action on the part of Plaintiffs, who stand in the position of the heirs of the body of the children of Susie McMullen Langille, could not have accrued prior to December, 1984, when such heirs of the body were first entitled to possession and enjoyment of the subject parcels upon the death of Mrs. Paul Bowden, a/k/a Jeannie A. Hall.

**Action for Declaration of Trustee's Title to the Mineral Interest**

51. Based upon the foregoing, Plaintiffs are entitled to a declaration by the Court that Trustee is currently vested with good title to the 1/16 mineral interest in the subject parcels and that Trustee recover 1/16 of past and future gross revenues from mineral production attributable to the subject parcels, less pro rata reasonable and necessary costs of drilling the wells and of producing and marketing such mineral production, burdened with the obligation on the part of Trustee to pay, or to hold in suspense, amounts equal to the fractional interests to which "non-participating" interest owners, their heirs, successors and assigns, holding under conveyances from H. J. McMullen, are entitled.

**Action to Seek Avoidance of Mineral Lease(s) by the Government Covering the Subject Parcels**

52. The Government, as lessor, executed an oil and gas lease with Tesoro, with an effective date of August 1, 1989, covering the subject parcel Z-27-A. Under this lease (and perhaps other oil and gas leases), the Oil Companies, as individual corporations and limited partnership, and/or as managing/general partners for producing groups (and perhaps other producers) are producing minerals from

subject parcel Z-27-A (and perhaps from other tracts of the subject parcels and from lands pooled therewith). A copy of the lease to Tesoro covering the subject parcel Z-27-A is attached hereto as Exhibit "3", which is incorporated herein by reference.

53. No order or judgment was entered in Civil Action No. 529 which authorized the Government to grant mineral leases on the subject parcels. The interest of Remaindermen under the Langille Will, in the subject parcels, was never before the Court in Civil Action No. 529. The Corporation was not served with notice of Civil Action No. 529. The Fort Worth National Bank, as Trustee of the Langille Trust, the Corporation, and/or Remaindermen under the Langille Will received no notice of the right of election granted by the Government in Civil Action No. 529, to retain oil and gas interests in the subject parcels. Such right of election was filed of record prior to the granting by the Government of any mineral lease covering the subject parcels. No guardian ad litem or attorney ad litem was appointed in Civil Action No. 529 to represent the interest of Remaindermen, although two Remaindermen were small children at the time of the commencement of Civil Action No. 529, and were still minors at the time of the Government's filings of the pleadings

which created the right of election. Upon learning of the existence of their right of election to retain oil and gas interests in the subject parcels, Plaintiffs, as Remaindermen and the duly constituted successors of Remaindermen under the Langille Will, elected in writing to retain their oil and gas interests in the subject parcels. Such right of election was never withdrawn or dismissed by the Government nor was it dismissed by the Court or ever made the subject of a final judgment in Civil Action No. 529. Therefore, any mineral lease granted by the Government covering the subject parcels is void and should be declared so by this Court.

**Action for Accounting and to Recover 1/16 of the Gross Revenues from Mineral Production Attributable to the Subject ParcelsLess Pro Rata Reasonable and Necessary Costs of Drillingthe Wells and of Producing and Marketing**

54. Plaintiffs seek an accounting from the Oil Companies, as individual corporations and a limited partnership and as managing/general partners of producing groups [and from all other producers determined by discovery in this cause to have produced minerals from the subject parcels and lands pooled therewith, pursuant to mineral lease(s) from the Government, referred to herein as ["discovered producers"] as to actual mineral production and gross

revenues resulting from mineral production from the subject parcels and from lands pooled with the subject parcels. Plaintiffs also seek an accounting as to the pro rata reasonable and necessary costs of drilling the wells and of producing and marketing the mineral production from the subject parcels and from lands pooled with the subject parcels.

55. Plaintiffs seek to recover 1/16 of the gross revenues from mineral production attributable to the subject parcels, less pro rata reasonable and necessary costs of drilling the wells and of producing and marketing the mineral production by the Oil Companies, as individual corporations and as managing/general partners of producing groups, and by discovered producers. Plaintiffs seek an order from this Court ordering the Government and the Oil Companies, as individual corporations or limited partnership, and as managing/general partners of producing groups, and ordering discovered producers to pay Trustee 1/16 of the gross revenues from past and future mineral production attributable to the subject parcels, less pro rata reasonable and necessary costs of drilling the wells and of producing and marketing such mineral production.

56. The recovery of l/16 of the gross revenues from past and

future production less appropriate reasonable and necessary costs, sought in the previous paragraph shall be burdened with Trustee's obligation to pay or to hold in suspense amounts equal to the fractional interest to which "non-participating" interest owners, holding under conveyances from H. J. McMullen, their heirs, successors and assigns, are entitled.

**PRAYER**

WHEREFORE, Plaintiffs pray that Falcon Aircraft Conversions, Inc.; Jaffe Energy, Inc.; ANR Production Company; Tesoro E & P Company, L.P., a limited partnership; and TransTexas Gas Corporation be summoned to appear and answer herein (the Oil Companies to answer as individual corporations and/or as a limited partnership, and/or as managing/general partners of producing groups, of the subject parcels and lands pooled therewith); and that, upon hearing, this Court declare that Trustee is currently vested with good title to the 1/16 mineral interest in the subject parcels and that Trustee recover 1/16 of past and future gross revenues from mineral production attributable to the subject parcels, less pro rata expenses of drilling, producing and marketing such mineral production, burdened with the obligation on the part of Trustee provided for in

paragraph 56, above; that Plaintiffs recover all of their costs incurred herein; and that Plaintiffs receive such other and further relief to which they may show themselves justly entitled.

Dated this ____ day of November, 1996.

Respectfully submitted,

REYNOLDS AND PENNINGTON, L.L.P.

By:_____<Signed>_____

H. Allen Pennington, Jr.
State Bar No. 15758500

Bank One Tower
500 Throckmorton Street, Suite 2805
P. O. Box 44105
Fort Worth, TX 76102
Phone: 817-332-8850
Fax: 817-332-4978

ATTORNEYS FOR PLAINTIFFS
BANK ONE, TEXAS, N.A., et al.

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and forgoing pleading has been served upon all parties and counsel of record via certified mail, return receipt requested, on this the _____ day of November, 1996:

Charles Wendlandt VIA CMRRR#P 363 234 702
Assistant United States Attorney
Wilson Plaza, Suite 1400
606 N. Carancahua
Corpus Christi, TX 78476

Elizabeth N. Miller VIA CMRRR#P 363 234 701
Jane M.N. Webre
Scott, Douglass, Luton & McConnico, L.L.P.
600 Congress Avenue, Suite 1500
Austin, Texas 78701-3234

William T. Armstrong, III VIA CMRRR #P 363 234 703
Charles Roberts
Foster, Lewis, Langley, Gardner & Banack, Inc.
112 East Pecan St., Suite 1100
San Antonio, TX 78205-1533

<Signed>
H. Allen Pennington, Jr.

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# Exhibit "A"

# Will of Susie McMullen Langille

STATE OF TEXAS )
COUNTY OF TARRANT )

I, SUSIE MCMULLEN LANGILLE, a resident and citizen of Fort Worth, Tarrant County, Texas, being of sound and disposing mind and memory, do make, publish and declare this to be my LAST WILL and TESTAMENT, hereby cancelllng, annulling and revoking all other and former will, and each and every codicil thereto by me heretofore made.

ITEM I.

(a) Following my death, I direct that my funeral be conducted by my good friend, FRED P. MUELLER, of Fort Worth, Texas, if living; otherwise by the firm with which he was associated at the time of his death, and that so far as possible, it be of the same character as that of my late husband, H. J. McMullen. I direct that my Executor, hereinafter named, or its successor or substitute, shall pay for my funeral expenses out of the funds realized from the sale of my Russian sables, and all of the diamonds, including the rings, pins, bars, and other articles on which they are mounted, I may own at the time of my death; and

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<SIGNED BY SUSIE McMULLEN LANGILLE>

the right to make such sale, for all cash, or all credit, or part cash and part credit, is hereby expressly granted to my said Executor.

(b) I direct my said Executor to first pay, out of such cash funds as may be on hand at the time of my death, or from cash realized by my said Executor, from the sale of any of my stocks, bonds, notes, securities, or other property, and the right to make such sale is hereby expressly granted to my said Executor, except that I provide the property devised and bequeathed in Item II hereof, shall be the last resorted to, all of my just and legal debts, including those incident to my last illness, and all estate, transfer, and inheritance taxes which may be levied or assessed upon or against my estate, and against the share or interest therein of any beneficiary.

ITEM II.

I give, devise and bequeath -

(a) To my beloved husband, George Langille:

(1) Such automobiles as may be owned by me, individually, and used personally by

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<SIGNED BY SUSIE McMULLEN LANGILLE>

me, or by my husband, or by both of us, being at present a Cadillac sedan and a Dodge Coupe; and;

(2) My Gar-Wood motorboat, located on the waters of Lake Worth, Tarrant County, Texas; and,

(3) My home on the shores of Lake Worth, Fort Worth, Tarrant County, Texas, known as "Red Crest", complete with all of the furniture, furnishings, lamps, rugs, fixtures, dishes, silverware, linens, bedding, drapes, pictures, implements, and any and all other objects, pieces, and personal property which are contained in, or used in connection with my said home, at the time of my death, except a mounted Tarpon, and a picture over the fireplace, which belong to my son, John H. McMullen.

In connection with the bequest of my home, "Red Crest", so long as it shall be owned and actually occupied by my husband, I hereby direct that the Trustee, hereinafter designated, shall pay, when due, out of the gross income from the Trust Estate hereinafter created, or such portion thereof as remains in its control, as hereinafter provided for, the following:

A. All premiums for insurance policies on "Red Crest" and the furniture and fixtures contained therein, not to exceed in the aggregate, however, Twelve Thousand Five Hundred Dollars ($12,500.00); and,

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B. The annual rental due to the City of Fort Worth, or any subdivision thereof, for the property upon which "Red Crest" is located, and the grounds in connection therewith; and,

C. Any other taxes, assessments and charges which may be assessed by or due to any lawfully constituted, governing body, whether now or hereafter created.

(b) To my beloved, and long-cherished friend, MRS. MAMIE ADAMS TERRY, of Fort Worth, Tarrant County, Texas, my white Ermine evening wrap;

(c) To my long-time employee, JOHN MONCRIEF, the sum of FIVE HUNDRED DOLLARS ($500.00);

(d) To my devoted servant, ERNEST RAMSEY:

Lot 20, Block 1, Mansfield Road Addition to the City of Fort Worth, Tarrant County, Texas, together with all improvements thereon.

(e) To my children, JOHN H. McMULLEN of Fort Worth, Texas, and MRS. PAUL BOWDEN of San Antonio Texas, to be divided as they may agree upon between themselves, all of the personal effects, clothes, jewelry, furniture, and fixtures which are not otherwise expressly disposed of by the provisions of this will.

ITEM III.

In event both of my children predecease me, then I hereby

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<SIGNED BY SUSIE McMULLEN LANGILLE>

give, devise and bequeath all of the rest, residue and remainder of my property, real, personal and mixed, of which I may die seized and possessed, to those persons entitled thereto, in accordance with the laws of descent and distribution, in the State of Texas, at the time of my death; in event, however, my two children, or either of them, survive me, I give, devise, and bequeath all of the rest, residue and remainder of my property, real, personal, and mixed, of which I may die seized and possessed, or to which I may in any way be entitled, of whatsoever the same may consist, and wherever situated, to THE FORT WORTH NATIONAL BANK, of Fort Worth, Texas, or its successor or substitute, as Trustee, in Trust, nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set out:

(1) I hereby direct and authorize my Trustee to receive, hold, manage, operate and control the Trust Estate hereby created.

A. My Trustee is expressly authorized and empowered, in its exclusive discretion as Trustee, to retain any notes (whether secured or otherwise), stocks, bonds,

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securities, or other evidences of indebtedness in the same form in which they may be at the time of my death, without liability for loss or depreciation in the value of such securities, for so doing, or my Trustee may sell the same, or any part thereof, for all cash, or all credit, or for part cash and part credit, with or without security, as my Trustee, in its exclusive discretion, may determine, and invest and reinvest the proceeds in such stocks, bonds, securities, notes (Vendor's lien or secured by Deed Of Trust) or other character of investments, real or personal, or both, secured or unsecured, as my Trustee shall, in its exclusive discretion, deem suitable; and the Trustee's Judgment in all such matters shall be final, conclusive and binding upon all beneficiaries of this Trust Estate.

B. I direct and authorize that my Trustee shall have and possess the following powers and authorities, in addition to those elsewhere in this Will granted:

1. To execute, acknowledge and deliver any and all necessary contracts of sale, deeds (with or without warranty), oil, gas and mineral conveyances, royalty deeds(with or without warranty), leases (and assignments thereof), covering or with respect to any land and real estate, or any interest therein, which may become a part of the principal of the

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Trust Estate hereby created. The Trustee is fully authorized to sell outright, in fee simple (with or without warranty), any oil, gas and mineral estate owned by the principal of the Trust Estate; or said Trustee may execute and deliver oil, gas and mineral leases, conveyances and royalty deeds (with or without warranty), covering real property, constituting a part of the principal of the Trust Fund, for a term either within or extending beyond the duration of the Trust.

2. To lease or rent any buildings, improvements, or real estate which may constitute a part of the principal of the Trust Fund, for such term as the Trustee, in its exclusive discretion, may deem advisable, even though the same may exist and extend beyond the term of the Trust; and further, to extend and renew any notes, secured or unsecured, which may be a part of the principal of the Trust Estate, for such respective terms, and upon such condition, as the Trustee, in its exclusive discretion, may approve, for a term either within or extending beyond the duration of the Trust.

3. To make advances out of the principal of the Trust Estate, to borrow money and to pledge as security, for the payment thereof, such part or portion of the assets of the principal of the Trust Estate as the Trustee may, in its exclusive discretion,

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approve, for the protection of any property which may be a part of the principal of the Trust Estate, resulting from sudden or pending foreclosure of mortgages, deeds of trust, pledges, or otherwise, or to protect the principal of the Trust Estate from any tax, assessments, or other charge, ordinary or extraordinary, which may be levied against the same; and in making payment of any moneys advanced or expended by the Trustee, either directly or to repay loans procured for the account of the principal of the Trust Estate, said Trustee is fully authorized to see so much of the property belonging to the principal of the Trust Fund, as shall be necessary, in the Trustee's exclusive judgment, to provide funds with which to make said payment.

4. To file suit in any court having jurisdiction of the Trust Estate, asking for the advice and judgment of the Court in the matter of the construction of this Trust Fund, or any provision hereof, or of the exercise of any right, power, or authority hereunder, and notice of such suit may be given to the living beneficiaries by such character of notice as the Court may require, and any unborn contingent beneficiary shall be deemed to be represented by the beneficiary or beneficiaries then living, and fully bound by any judgment entered in such suit, to the same extent

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as if then in being.

5. To make demands, sue, and receipt for all amounts due and owing to, and claims and causes of action owned by or involving this Trust; and, to defend all claims and causes of action asserted against the Trust property, or this Trust, or the interest of any beneficiary herein, and to settle and compromise for, and in behalf of this Trust, and all beneficiaries of same, all claims, demands, and causes of action, involving either the Trust property or the right, title or interest of any beneficiary therein, now in being or unborn; all of which said settlement and compromise as so made by said Trustee, shall be made by the Trustee acting upon its sole and exclusive discretion and judgment, and when made, shall be binding upon all of the Trust Estate, whether in being or unborn.

6. To vote in person or by proxy upon all stocks or other securities held by my Trustee; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation; to enter into any agreement in respect to the redemption of any stock of any corporation; to consent to the reorganization, consolidation, or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation, and upon such reorganization, consolidation,

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merger, sale or lease, to exchange the securities held by my Trustee for the securities issued in connection; therewith; to pay all assessments, subscriptions, and other sums of money as may be required for the protection of the interest of the Trust Estate as holder of any stocks, bonds, or other securities of any corporation; to exercise any option contained in any stocks, bonds, or other securities, for the conversion thereof into other securities, or take advantage of any right to subscribe for additional stocks, bonds, or other securities, and to make any and all necessary payments therefor; to execute release of mortgages, pledges and liens of all character, and generally to exercise in respect of all stocks, bonds, securities, notes, or other investments held by the Trustee, whenever acquired, all such rights, powers and privileges as may be lawfully exercised by any person owning similar property in his own right; provided, however, that the Trustee shall not make any of the payments herein permitted, except from the principal of the Trust Estate.

7. To employ, at the expense of my estate, all necessary attorneys, accountants, tax consultants, bookkeepers, and clerical help.

I further direct and authorize my trustee to continue to operate and conduct any

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business or businesses in which I may be engaged at the time of my death, or to liquidate all or part of them, at its sole and exclusive discretion, and if operated, the profits thereof shall be considered as income.

C. I further direct and authorize my Trustee to pay all operating and maintenance expenses, taxes and insurance; and in the event the revenues therefrom are insufficient to meet the operating expenses, taxes and insurance, I expressly authorize and empower my said Trustee to borrow, from time to time, so long as the Trust shall continue, such amount of money, as in the Trustee's judgment is required to meet and pay deficiencies and operating expenses, insurance and taxes, and to secure any and all such loans, to execute and deliver from time to time such mortgages and deeds of trust, with or without powers of sale, as my Trustee considers should be given upon any part, or all of my said Trust Estate, such mortgages and deeds of trust to contain such terms, conditions and powers of sale as my said Trustee may approve; and in all such matters the Judgment and discretion of my said Trustee shall be binding and conclusive upon all beneficiaries of the Trust so established by me, and I expressly stipulate and provide that the ultimate or contingent interest of the beneficiaries herein named, and the heirs of their bodies shall be subordinate to the power and authority herein given to my Trustee to borrow and to execute mortgages and deeds of trust, from time to

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time, upon the Trust Estate, or such portion as remains in its hand, and to pay deficiencies and operating expense, taxes and insurance, so long as the Trust, or any portion thereof herein established, shall continue.

D. I further authorize and direct that my Trustee shall have full power and authority to sell, at public or private sale, for cash or for credit, or for both, any and all portions of the principal of the Trust Estate hereby created, or any part thereof remaining under its control, when and so often as it deems to the best interest of the Trust Estate, in accordance with its sole and exclusive judgment and discretion, and to make, execute and deliver all necessary deeds (with or without warranty), bills of sale, conveyances, contracts, or other instruments; and to invest, and reinvest, from time to time, the proceeds thereof in such other property, either real estate or notes secured by Vendors lien or by Deed of Trust, stocks, bonds or other securities, which it, in the exercise of its sole and exclusive discretion, may select, with full power to sell, exchange, and substitute, to the same extent generally as such rights, powers and privileges may be lawfully exercised by any person owning similar property in his own right. In making this provision, I expressly provide that, except for fraud, or gross negligence, my Trustee shall in no way, nor to any extent, be liable or responsible to the ultimate beneficiaries of the Trust Estate, for any losses resulting from investment or

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reinvestment during the period of this Trust, and I hereby ratify, approve and confirm all acts done and performed by my Trustee.

E. In addition to the powers and authorities herein expressly given to my Trustee, I hereby expressly authorize and empower it to conduct and carry on the Trust Estate and transact any and all affairs and business incident thereto, fully clothing the Trustee with full and unrestricted power and authority to act as fully as if I, myself, were acting, so that no question can ever be raised as to the power and authority of my Trustee.

F. I further direct and authorize my Trustee, after deducting from the gross income of the Trust Estate all costs of operation, and maintenance, both as to the Trust Estate and as to the property comprising it, all reasonable fees of the Trustee, attorneys, accountants, tax consultants, bookkeepers, clerical help, and others reasonably necessary in the handling and management of my estate, improvements, modernization, repairs and replacement, the charges provided for in connection with my home "Red Crest" in Item II hereof, all taxes, assessments, and such other charges as my Trustee shall, in its sole and exclusive discretion deem necessary or proper, to apportion and pay over the net income, semi-annually or oftener, if in the sole and exclusive discretion of my Trustee, it deems desirable, as follows:

To my son, JOHN H. McMULLEN, one-half;

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<SIGNED BY SUSIE McMULLEN LANGILLE>

To my daughter, MRS. PAUL BOWDEN, one-half;

G. It is my further wish and direction, that as each of my children shall attain the age of forty years, to such child or children there shall be paid each year thereafter, for ten years, so far as is practicable in the handling of this estate, out of the principal of the Trust property, a sum equivalent to three and one-third per cent of the principal of the Estate so that at the expiration of ten years from the time when such child or children shall attain the age of forty years, he or she shall have received one-third of the principal of the Trust Estate herein created. As each payment is made from the principal of the Trust Estate, the income from the balance of the principal, as to such child receiving it, will thereby be reduced in such proportion as such child or children shall have been paid his or her share of the principal. From and after the date both of my children shall reach the age of fifty years, each shall continue to receive, as long as each shall live, one-half of the net income from the balance of the Trust Estate herein created.

H. If either of my two children shall predecease me, or at the death of either of my children, after my death, the interest of such deceased child in the Trust Estate herein created, both as to net income and as to principal, shall go to and be for the use and benefit of the survivor.

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<SIGNED BY SUSIE McMULLEN LANGILLE>

I. At the death of the survivor of my children, one or both of them surviving me, then this Trust Estate shall terminate and the principal of the Trust Estate then remaining in the control of the Trustee, shall be delivered and paid over to the heirs of the body of my children, per stirpes and not per capita.

J. At the termination of the Trust Estate, the Trustee is authorized and directed to make division and distribution of the principal of the Trust Fund in kind, or partly in kind and partly in money, or all in money, at the absolute discretion of the Trustee; and preliminary to, and to accomplish such division and distribution, said Trustee shall be fully authorized and empowered to sell and reduce to cash or its equivalent, any part or all of the properties, or assets on hand, constituting the principal fund, at such prices, and under such terms and conditions a as to said Trustee should seem advisable, and to the best interest of the Trust Estate.

K. If at the death of the survivor of my children, there be no heirs of the body of my children, then the principal of the Trust Estate remaining within the control of the Trustee shall be disposed of as hereinabove provided, in accordance with the laws of descent and distribution in effect in Texas at the time of my death.

L. Notwithstanding the other provisions regarding the estate herein created, I hereby expressly authorize and direct the Trustee, in

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its sole discretion, to use the principal of this estate, not to exceed one-half (½) thereof, however, for the use and benefit of either of my children, in the event either or both of them need an additional sum over and above the net income thereof, by virtue of illness, injury or physical disability, it being my express intention that the Trustee shall be authorized to use such portion of the Trust Estate herein created, in the payment of medical expenses, physicians', surgeons' or nurses' fees, hospital costs, and any other expense which, in the judgment of the Trustee, it deems necessary or useful for the comfort and treatment of such child. Any such advances made to such child, shall be charged to such child's portion of the income, or future interests in the principal of the Trust Estate.

ITEM IV.

I further direct and declare that each and every gift, legacy or provision of this my Will, whereby any money or property is given to or for the benefit of any person or persons is subject to the following express condition; that is to say, that the person or persons to whom, or in case of trust, for whose benefit such money or property is given, shall not in any manner contest or oppose the probate of this my Will, or assert in any manner, direct or indirect,

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before any judicial tribunal that the same is not my last Will and Testament, or deny or call in question before any judicial tribunal the legal validity of any of the dispositions or provisions therein contained, and in case any person or persons, to whom, or in case of trusts, for whose benefit, any such money or property is by this Will given, shall in any manner contest or oppose the probate thereof, or assert in any manner, directly or indirectly, before any judicial tribunal, that the same is not my last Will and Testament, or deny or call in question before any judicial tribunal, the legal validity of any of the dispositions therein contained, then in such case, and in every such case, the money or property which is by any provision of this Will destined to or for the benefit of such person, or persons, and any estate, share or interest in any property, real or personal, left by me at my death, shall thereupon go to my husband, GEORGE LANGILLE, if then alive, and to accomplish this, the proportionate part of the Trust Estate herein created, for the use and benefit of such person or persons, shall be, by the Trustee, liquidated, at the earliest time practicable, without undue

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sacrifice, and the proceeds thereof paid to my husband, GEORGE LANGILLE, and to be owned by him in fee simple.

ITEM V.

I hereby nominate and appoint the FORT WORTH NATIONAL BANK, of Fort Worth, Texas, Executor of this my last Will and Testament, and Trustee for the purposes therein stated, and direct that no bond be required of it, and that no action be had in the Probate Court under this will, other than filing an inventory and appraisement and list of claims, as required by law. Should the Fort Worth National Bank fail, refuse, or be unable to act as Trustee of the Trust Estate herein created, or, having accepted such Trust, decline further to serve, then I direct and authorize the Judge of the United States District Court, sitting at Forth Worth, to appoint and nominate a successor Trustee, with all the powers and authorities and discretion given to the said Fort Worth National Bank, and I request that such selection be a corporate trust company, including a national bank, doing business in Fort Worth, Tarrant County, Texas, if possible. In like manner,

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

I direct that such successor Trustees be designated if the occasion requires.

IN WITNESS WHEREOF, I have hereunto set my hand, at Fort Worth, Texas, in the presence of <SIGNED> and <SIGNED>, attesting witnesses, this the <20th> day of October, A.D. 1938.

<SIGNED>
Testator

Signed, Declared and Published by SUSIE McMULLEN LANGILLE, as her LAST WILL AND TESTAMENT, in the presence of us and each of us, the undersigned, who, at her request and in her presence, and in the presence of each other, hereunto subscribe our names as attesting witnesses, this the <20th> day of October, A.D. 1938.

<SIGNED>

<SIGNED>
Witnesses.

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

# Exhibit "B"

# Codicil to Will of Susie McMullen Langille

I, SUSIE McMULLEN LANGILLE, being of sound and disposing mind and memory, do hereby make and publish this the first Codicil to my Will, duly executed by me on October 20, 1938, consisting of twelve (12) pages and to which original Will this Codicil is attached.

1. In connection with Paragraphs A, B and C, subsection (3), Section (a) or Item II, providing for the payment Of certain insurance premiums, rentals, taxes, assessments, etc., it was my intention at the time of the execution of my Will, and now is my intention, that such charges shall be made by my Trustee, for a period of time not exceeding the term of the Trust Estate. Further, in connection with the said Paragraph A, relating to the payment of insurance premiums, it was my intention at the time of execution of the Will, and is now my intention, that the payments provided to be made by my Trustee shall be all of the insurance premiums on policies covering my house, "Red Crest" and furniture, which policies do not exceed the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) these payments likewise not to be made beyond the term of the Trust.

2. In connection with Paragraph A, Section (l) of Item III, authorizing my Trustee to retain certain personal property of mine, it was my intention at the time of the execution of my Will, and is now my intention, in addition to the complete powers granted to my Trustee in connection with the properties named therein, that it should likewise have the same right and privileges with respect to any and all real property, it being my intention

then, and now, to extend to my Trustee all the rights designated, not only with respect to personal property, but all property of which I may die seized and possessed, except as may be otherwise expressly designated in my said Will.

3. I further direct and provide that so long as the Trustee designated in my Will shall be vested with the ownership and possession of the principal and income of the Trust Estate, no beneficiary shall have or possess any power to dispose of, or in any way encumber or charge by way of anticipation or otherwise, the income or principal payable to any such beneficiary, or to dispose of, charge or encumber such beneficiary's share or interest in the Trust property, nor shall the trust property, or the net income derived therefrom, or the beneficial interest possessed therein by any of the named beneficiaries be liable or chargeable under writs of attachment, garnishment, execution or otherwise, in the hands of the Trustee for any debt or liability of such beneficiary, prior to the actual delivery thereof by the Trustee, and the actual receipt thereof by the beneficiary.

Except as my said Will Of October 20, 1938 is by this Codicil modified and changed, it is by me in all things ratified, confirmed and approved.

IN TESTIMONY WHEREOF, I, SUSIE McMULLEN LANGILLE, have, to this my first Codicil to my Last Will and Testament, subscribed my name this the <3rd> day of

Identified:

<SIGNED by Susie McMullen Langille>

November, A. D. 1938.

<SIGNED>

SIGNED, PUBLISHED and DECLARED by the above named Testatrix, as and for the first Codicil to her Last Will and Testament, in the presence of us, and each of us, who at her request, in her presence, and in the presence of each other, have subscribed our names hereunto as attesting witnesses the day and year last above written.

<SIGNED>
Witness

<SIGNED>
Witness

Identified:
<SIGNED by Susie McMullen Langille>

**Exhibit "C"**

**Conveyance from H. J. McMullen to McMullen Oil & Royalty Company, Inc., dated November 19, 1928, which appears in Vol. 20, at p. 87 of the Deed Records of Zapata County, Texas**

THE STATE OF TEXAS §
§
COUNTY OF TARRANT §

KNOW ALL MEN BY THESE PRESENTS: That I, H. J. McMullen of the County of Tarrant and State of Texas, for and in consideration of the sum of Tex ($10.00) DOLLARS cash in hand paid to me by McMullen Oil & Royalty Company, Inc., a Texas Corporation, receipt of which is hereby acknowledged, and other good and valuable consideration, all paid by McMullen Oil & Royalty Company, Inc., a Texas Corporation, receipt of all of which is hereby acknowledged, do hereby TRANSFER, ASSIGN and CONVEY to McMullen Oil & Royalty Company, Inc., a corporation, any and all of the moneys of any kind or character paid by any person, firm or corporation, in any manner, as down payment bonus money or delay rentals, in connection with any oil, gas or mineral leases of any kind or character hereafter executed that in any way covers all or any part of any oil, gas or other minerals or land now or hereafter owned in whole or in part by H. J. McMullen in the County of Zapata and State of Texas.

For the same consideration paid by McMullen Oil & Royalty Company, Inc., a corporation, I do hereby give to McMullen Oil &

Royalty Company, Inc., a corporation, the full right, power and authority to execute such oil, gas and mineral leases on the property above described, in its own name as lessor, without the joinder of H. J. McMullen, or any of his heirs, representatives or assigns, to such persons, firms or corporations as it may deem best, and for such sum or sums of money as bonus or delay rental moneys and on such terms and provisions as it may deem best. Provided, however, that in all such oil, gas and mining leases executed by McMullen Oil & Royalty Company, Inc., a corporation, as above provided, all royalties as provided in said lease shall be the property of H. J. McMullen, individually, and his heirs, representatives and assigns, and such leases, which the McMullen Oil & Royalty Company, Inc. has the power and authority to execute in its own name, shall provide by their terms that the royalties as provided in said lease shall be payable to H. J. McMullen. Such royalty as provided in said leases so executed by McMullen Oil & Royalty Company, Inc., a corporation, covering property or minerals owned by H. J. McMullen, individually, shall never be less than 1/8th of the oil produced and saved from said land and shall never be less than 1/8th of the net proceeds received by lessee from the sale of gas, of gasoline content, from gas wells or oil

wells, including casinghead gas, or, when any such gas is Utilized by lessee in the manufacture of gasoline either upon or off said premises, lessor shall be paid the market value at the wells, of 1/8th of any such gas. McMullen Oil & Royalty Company, Inc., shall, with the exception of providing for the royalties above set out, executed such oil and gas leases as herein provided on such terms and with such provisions in same as it may deem best. Provided, however, that in the event H. J. McMullen, individually, should own an interest in said land covered by such lease, less than the entire fee simple estate, or any interest in the minerals less than the whole, then the royalties as above provided to be paid to H. J. McMullen under the terms of said oil and gas leases to be executed by McMullen Oil & Royalty Company, Inc., can be reduced proportionately by said McMullen Oil & Royalty Company, Inc., and such provision in such lease reducing said royalties proportionately, shall be valid and binding upon H. J. McMullen.

It is the purpose and intention of this instrument to entirely divest H. J. McMullen of all right or control over the oil, gas or other minerals in the property described in this instrument, save and except the right to receive the royalty oil, gas and other minerals, or the

moneys payable from the sale thereof, and it is the purpose and intention of this instrument to vest in McMullen Oil & Royalty Company, Inc., the full right, in its own name, to execute oil, gas, and mining leases on the oil, gas or mineral interest or land now or hereafter owned by H. J. McMullen or standing in his name, in Zapata County, to such persons, firms or corporations as it may deem best and on such terms and for such bonus moneys and delay rentals as it may deem best, and that all such cash payments, bonus moneys and delay rentals shall be paid to McMullen Oil & Royalty Company, Inc., and H. J. McMullen, his heirs, representatives and assigns shall never have any interest therein nor in any way be entitled to any part thereof.

WITNESS MY HAND this 19th day of November A.D. 1928.

H. J. McMullen

# Exhibit "1"

## Relevant Portions of *Amended Petition in Condemnation No. 3*

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | * | |
| Petitioner | * | CIVIL ACTION NO. 529 |
| Vs. | * | |
| 85,237 ACRES OF LAND, MORE OR LESS, IN ZAPATA, COUNTY STATE OF TEXAS, FLUMENCIO MUNOZ, ETAL., | * | AMENDED PETITION IN CONDEMNATION NO. 3 |
| Defendants. | * | |

TO THE HONORABLES, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS:

1. This is an action of a civil nature brought by the United States of America at the request of the Secretary of State for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the following Acts of Congress and amendments thereto: Act of August 1, 1888 (40 U.S.C. Sec. 257), Act approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act approved August 19, 1935

(22 U.S.C. 277 b&c) as amended, and the Treaty Between the United States of America and Mexico, concluded February 3, 1944, (Treaty Series 994) entitled "Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande" and Protocol and executive orders, and the American-Mexican Treaty Act of 1950 (22 U.S.C. 277 d-1, et seq.), and the Acts approved July 9, 1947, Public Law 166; June 3, 1948, Public Law 597; July 20, 1949, Public Law 179 and September 6, 1950 (64 Stat. 611), which acts appropriate funds which are available for such purposes.

3. The use for which the property is to be taken is as follows: the said lands are necessary adequately to provide for the utilization of the waters of the Rio Grande. Said lands have been selected for acquisition by the United States of America for use in connection with the establishment of the Falcon Dam and Reservoir - Rio Grande International Dams Project, and for such other uses as may be authorized by Congress or by Executive Order.

4. The interest in the property to be acquired is:

> In Tracts A and A-2, as shown on Exhibit "D", the fee simple estate, (save and except oil and gas, but subject to the negative easement in and under lands described in Paragraph "5" in the original Petition in Condemnation) and the fee simple estate in the area shown as the Town of

Zapata, as shown on the replat of said town made by the International Boundary and Water Commission, filed for record with the County Clerk of Zapata County, Texas. In all of the other lands in Tracts A and A-2, the fee simple estate, provided, however, that the owners of the oil and gas in and under said tracts may, at their election, retain title to said oil and gas, subject to the terms of the negative easement prohibiting the drilling or deepening of any well for the purpose of producing oil and/or gas, provided, however, that exploration and development of oil and/or gas under said lands will be permitted by directional drilling from locations above the 325 ft. elevation traverse, acquired by Declaration of Taking Nos. 2 and 3.

[REFERENCES TO OTHER TRACTS OMITTED]

5. The property so to be taken is described in the Exhibit "A" hereto attached.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are:

(a) Porciones 14 through 17, Zapata County, Texas, the persons setout after each parcel in Declaration of Taking No. 1, filed in this cause.

[OTHER SUBPARAGRAPHS OMITTED]

7. The State of Texas and the County of Zapata, Texas, may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Unknown Others".

The interest sought to be condemned in tracts above described is subject to existing easements for public roads and public utilities.

Wherefore, the plaintiff demands judgment that the property be condemned and that such compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

BRIAN S. ODEM,
UNITED STATES ATTORNEY

ARTHUR L. MOLLER,
Special Assistant

By: <SIGNED>
CHARLES N. FANSLER,
Special Assistant

Trial by jury of the issue of just compensation is demanded by plaintiff.

<SIGNED>
CHARLES N. FANSLER,
Special Assistant

EXHIBIT "A"

TRACT A

51,031 acres of land, more or less, in Zapata County, Texas, situated within Porciones 14 through 36, inclusive, and being all of Tract A, described by metes and bounds in Exhibit 1 attached to the original Petition in Condemnation filed in this cause, to which reference is here made, save and except Tract E in Porciones 14 through 36, hereinafter described, and shown on Exhibit "D" attached hereto.

[REFERENCES TO OTHER TRACTS OMITTED]

EXHIBIT "B"

Boundary of Lands to be Acquired in Zapata County, Texas for Reservoir.

[LEGAL DESCRIPTION OMITTED]

# Exhibit "2"

## Relevant Portions of *Amended Petition in Condemnation No. 12*

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | § | |
| | § | |
| Plaintiff | § | |
| Vs. | § | CIVIL ACTION NO. 529 |
| | § | |
| | § | AMENDED PETITION |
| 85237 ACRES OF LAND, | § | IN CONDEMNATION |
| MORE OR LESS, IN | § | NO. 12 |
| ZAPATA COUNTY, | § | |
| STATE OF TEXAS, | § | |
| FLUMENCIO MUNOZ, ET AL. | § | (Additional Parties |
| Defendants | § | for all Parcels) |

***

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS:

NOW COMES the United States Of America by Malcolm R. Wilkey, United States Attorney for the Southern District of Texas, and Robert M. McKee, Attorney, Department Of Justice, and files its Amended Petition in Condemnation No. 12:

1. Paragraph No. 6 of Amended Petition in Condemnation No. 3 is amended by adding a sub-paragraph to be numbered (w) and to read as follows: The persons set out below, whether such names be repeated or not, may have or claim an interest in and to each or every parcel of land described in Amended Complaints Numbers 3, 4, 5, 6, 7, 8, and 11:

J. N. Abel and wife, Vernice Abel, Eugene T. Adair, Maurice M. Alexander and wife, Aurora Alexander, Alice Bank and Trust Company, W. W. Allen, Rodolfo Alvares, Anderson-Prichard Oil Corporation, Lorraine Andrews, Robert U. Andrews, Worth B. Andrews, Sr., and wife Stella Andrews, Worth B. Andrews, Jr., Everett Anglin, Pedro Armengol and wife, Mrs. Pedro Armengol, Aurora C. Arredondo, Angela Pena de Avalos and husband, Porfirio Avalos, Logan H. Bagby, Charles Baker, Joan K. Ball, T. R. Banks, Eunice Ruth Barbee and husband, Fred E. Barbee, Ed Barnett and wife, Marguerita Harrington Barnett, Earl K. Batema, Gus A. Becker, Anastasia Pena de Benavides and husband, Pedro Benavides, Arturo Benavides, Trustee for Zapata C. Indep. Sch. Dist., Celia Gonzalez Benavides and husband, Heberto Benavides, Celia M. de Benavidez and husband, Juan Benavides, Jr., Guadalupe Benavides, Lydia Guadalupe Benavides, Mauro Benavides and wife, Lydia S. Benavides, Raul Benavides, Servando Benavides, Roy A. Berentz Company, Inc., Floyd Billings and wife, Norma B. Billings, Robert L. Bobbitt, Bonnie B. Bobo, Mrs. E. G. Bond and husband, E. G. Bond, L. Braeter, Billy Bridewell, John H. Jacobs, Marcus Jacobs, A. Stone, also known as A. Stone James and husband, A. James, William G. James, William J. James, C. E. Jamison, Alexander Johnson, Carl A. Johnson, Fred D. Johnson, Harvey Johnson, Lutz Johnson, Margaret L. Johnson, Robert G. Johnson, R. H. Johnson, S. P. Johnson, William A. Joines, A. C. Jones, Federico Jones, John Otis Jones, Juan Jones, L. L. Jones, J. A. Jucker, Walter Journeay,

Kaercher and Company, Incorporated, Oscar T. Kalin, William M. Keating, H. C. Keefe, George L. Kelley, A. M. Keneipp and Son, C. D. Kennedy, Max J. Kennedy, H. F. Kennerley, Elmer Kenney, William M. Kerlin, Jas. E. Kervin, Fred L. Ketch, D. Kilvroff, H. P. King, H. T. King, N. R. King, Nat B. King, Walter Kingsley, Katherin Kinney and husband, _____, Kinney, C. T. Kirthart, Mary La Rue Klepper, Thomas N. Klepper, J. J. Klinge, John K. Know, August Koelle, O. H. Kock, John Kopera, Martin Kowalske, John C. Know, John C. Knox, A. J. Knutson, Herman Kremer and wife, Mrs. Herman Kremer, W. E. Kreps, Charles A. Kumke, George H. Kupfrain, George H. Kupfrian, Ernest Kunzman, Mrs. M. V. Labarre, F. G. Lamson, Susie McMullen Langille and husband, George M. Langille, Allen L. Langley, J. A. Langton, T. M. Langton, Frank Lankiweicz, Lanroy Incorporated, Ira B. Laughlin, Edward C. Lawson, Adelina Guerra Leal, Cleofas Guerra Leal and husband, Julio Leal, Simon Leal, John H. Leavell, W. H. Ledman, Lenoir M. Josey, Incorporated, Damasio de Leon, Delfino de Leon, Delfina de Leon, Donaciano de Leon, Geo. J. Lescho, P. R. Lewellen, C. H. Lewis, Carl O. Lewis, J. A. Lewis, R. Lewis, R. B. Lewis, Robt. Lewis, Henry P. Lincoln and wife, Annie M. S. Lincoln, A. A. Lindsey, J. J. Lindsey, Wm. J. Link, Henry A. Linn, J. W. Little, Gus A. Llambias, Bacilia Rodriguez Longoria, Camilo Longoria, Felix Longoria, Fidel Longoria, Rovinson Longoria, B. H. Loomis, Antonio Lopez, Eulalia Vela de Lopez, Eufracia Ramirez Lopez and husband, Guadalupe Lopez, Evangalina Barbareno de Lopez and husband, Gustavo Lopez,

Felipe Lopez, Jesus Lopez, Jose Lopez, Juan Lopez, Luciano Lopez, Nicolas Lopez, Olibia Benavides Lopez and husband, Aurelio Lopez, Romana B. de Lopez, George W. Lovejoy, Sarah Redmond Lovenskiola and husband, Perry G. Lovenskiola, Alfred R. Loweth, Antonio Lozano, Felipa Ramirez Lozano and husband, Tiburcio Lozano, Librado Lozano, Manuela Lozano, Manuela Pena Vda. de Lozano, Teodora R. Vda. Lozano, Teodoro Lozano, Adolfo Lugo, Angela Lugo, Asuncion Lugo, Eliza Lugo, Francisca Lugo, Francisco Lugo, Jesus Lugo, Jose Angel Lugo, Jose Angel Lugo and Refugio Campos, Juan Lugo, Manuel Lugo, Manuel Lugo and wife, Cipriana Robles Lugo, Pedro Lugo, Porfirio Lugo, Refugia C. Vda. de Lugo, Serafin Lugo, Tomas Lugo, Trinidad Lugo, Matthew Lukasiuk, Emil Lund, Lundell Royalty Company, Edwin F. Lutz, Olaf O. Lying, Olaf O. Lyng, Ida M. Lytle, May F. McAllister, Michael McCabe, James G. McCarrick, W. E. McCarson, C. E. McCaughey, C. L. McCaughey, W. R. McClanahan, Arturo McCoy, Jacinta Lugo McCoy and husband, William McCoy, Maurice S. McCoy, Nellie McCoy, Robert McCoy, William McCoy, Jr., J. M. McCulloch, W. H. McCullough, John F. McDermott, Juana Y. McDermott, Tomas McDermott, also known as Thomas C. McDermott, William McDonald, Jr., J. K. McFarlane, Lillian B. McGill, A. C. McGilton, J. R. McGinley, D. M. MacGregor, James McHattie, J. H. McKay, C. A. McLane, Ella H. McLean, A. R. McLennan, Individually and as Trustee, H. J. McMullen, Susie McMullen, McMullen Oil and Royalty Company, Incorporated, Sue

McMullen, C. D. McQueen, W. S. McRoberts, John E. McVicar, Freeman McWhorter, C. O. Maddox, Vird L. Mahurin, Majestic Royalties Company, Percy Mallett, W. H. Maney, Ollie M. Marquess, Christian R. Martin, Robert Lee Martin, Adolfo Martinez, Anita Carrasco Martinez and husband, Crispin Martinez, Antonio Martinez, Celsa Rodriguez Martinez and husband, Zaragoza Martinez, Emilia Longoria Martinez and husband, Margarito Martinez, Epitacia Botello de Martinez and husband, Francisco Martinez, Eufemia Rodriguez Martinez and husband, Zaragosa Martinez, Gregoria Martinez and husband, Pablo T. Martinez, Guadalupe Barbareno de Martinez and husband, Juan Manuel Martinez, J. A. Martinez, Juan Manuel Martinez, Matilde Martinez, Narciso Martinez, Pablo Martinez, Pablo T. Martinez and wife, Gregoria Garcia de Trevino Martinez, Zaragoza Duran Martinez, Ewing Mason, Mirian S. Mason, Myrtle M. Mason, Ralph S. Mason, John R. Mast, M. L. Massingill, James L. Matthews, J. R. Maxwell, William Mayne, E. E. Mayo, Minnie I. Meacham, B. C. Mead, Antonio G. Medina and wife, Hermelinda Medina, Valentin Medina and wife, Celsa Escamilia Medina, F. Ernest Mehlhorn, Wm. E. Mehlich, William O. Mehlich, Jose Mendoza and wife, Rita G. Mendoza, Ella Mercer, Edwin Merrithew, Fred W. Mertz, Jr., Henry Meyer, Marciala S. Meza and husband, Sabas Meza, Paul Ellwood Middleton and wife, Sophie Walther Middleton, Midfield Oil Royalties of Texas, Midwest Oil Corporation, August Mihleisen and wife, Harriet Mihleisen, Abe Miller, Wm. G. Miller, Con Mims, Homer E.

Minor, Mille C. Moake, Thomas J. Moake, Trissy B. Moake and wife, Daisy Puckett Moake, Henry Mol, Monarch Oil and Royalty Corporation of Texas, Winniford Montague, Manuela Rodriguez Vda. de Montemayor, R. R. Moodie, A. V. Moore, Susan Moore, Bernardo Morales, Crisanto Morales, Jose Maria Morales, Olivia Morales, Rose A. Moran, Angelita Rodriguez Vda. de Morano, Jose Moreno, Librada Moreno, Martin Moreno, Paula Rodriguez Moreno and husband, Simon Moreno, Ramirez, Teodulo Ramirez and wife, Refugio Benavides Ramirez, Teresa Vela de Ramirez and husband, Manuel R. Ramirez, Cipriano Ramon, Cipriano Ramon and wife,

Maria Ramon, Francisca R. Vda. de Ramon, Isidoro Ramon, Juan Ramon and wife, Maria C. Ramon, Rafael Ramon, D. E. Reynolds and husband, Jack Reynolds, Olivia Hernandez Ruiz and husband, Del Ruiz, Elida Ramirez de Saenz and husband, Juan B. Saenz, Luisa Calleja de Salas and husband, Jose Salas, Pedro Salas and wife, Maria de Salas, Prudencio Salas and wife, Lucrecia de Salas, Gregoria Calleja Vda. de Salinas and husband, Felipe Salinas, Octavia Salinas, Santiago Salinas, Fidencio Serna, Guadalupe Serna, Mauricia Serna, Refugio Serna and wife, Mrs. Refugio Serna, Ralph B. Shanks, Alberta de Silva, George Smelsey, Stella G. Smeltz, South Texas Gas Company, Sofia Valls Stewart and husband, E. H. Stewart, Agnes Garcia Tejeda and husband, Severiano Tejeda, Maria Garcia Terrazas and husband, David Terrazas, Anatelo Trevino and wife, Guadalupe Trevino, Beatriz C. de Trevino and husband, Primitivo Trevino, Lucrecia Gonzalez

de Trevino, Petra C. Trevino, and husband, Ted Trevino, Rafael Trevino, Irene Trub and husband, Roberto Trub, Ignacio Uribe, Jose Angel Uribe, United Gas Company, Avelina Valls, David Vela, David Vela and wife, Refugia Garza Vela, Domingo Vela and wife, Refugia Cuellar Vela, Erasmo Vela, Genoveva Vela, Genoveva Hernandez Vela, Gertrudis Vela and husband, Juan Gonzalez Gutierrez, Gordiano Vela and wife, Manuela Ramirez Vela, Isidro Vela and wife, Aurelia Cuellar, Jose Maria Vela and wife, Rafael Flores, Julian Vela and wife, Evita Cuellar, Manuela Vela, Santiago Vela, Santiago Vela and wife, Candelaria Ramirez Vela, Teodoro Vela and wife, Refugia Cuellar Vela, Ysidro Vela, Adela Garcia Vidaurri, Celso Vidaurri, Jr. and wife, Mabel L. Vidaurri, Celso Vidaurri, Manuel Vidaurri and wife, Azucena P. Vidaurri, Rafael Vidaurri and wife, Cristina de la Pena Vidaurri, Berta C. Villarreal and husband, Rodolfo L. Villarreal, Jose Maria Villarreal, Juan Villarreal, Manuela Vela Villarreal and husband, Florencio Villarreal, Evilia Hernandez Watson, Park Weaver, Individually and as Trustee under the will of John Warner Hobart, W. D. Workman, George E, Young, J. E. Young, Ruth B. Zeller, Eugenio Zuniga and wife, Lupe Bravito Zuniga, Herlinda Garcia Zuniga and husband, Antonio Zuniga.

In all other respects the Amended Petition in Condemnation, as otherwise amended, remains the same.

Wherefore, the Plaintiff prays, as in its Original Petition in Condemnation, for condemnation.

This the __<6TH.__ day of March, 1956.

UNITED STATES OF AMERICA, Plaintiff

MALCOLM R. WILKEY
UNITED STATES ATTORNEY

By: <SIGNED>
Charles L. Short,
Assistant United States Attorney

<SIGNED>
Charles N. Fansler,
Assistant United States Attorney

<SIGNED>
Robert M. McKee,
Attorney, Department of Justice

**Exhibit "3"**

**Relevant Portions of *Offer to Lease and Lease for Oil and Gas* from United States Department of the Interior, Bureau of Land Management to Tesoro Exploration and Production Company, dated August 1, 1989**

**Vol. 2, Dkt. 29**

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGMENT

# OFFER TO LEASE AND LEASE FOR OIL AND GAS

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[ILLEGIBLE SUBPARAGRAPHS OMITTED]

TESORO EXPLORATION AND
PRODUCTION COMPANY
8700 TESORO DRIVE
SAN ANTONIO, TX 78217

---

[ILLEGIBLE PORTION OMITTED]

---

TRACT 27-A, ALL OF SHARE 28-A OUT OF PORCION 14, ZAPATA COUNTY, TEXAS, WITHIN THE FALCON DAM RESERVOIR.
1/16TH U.S. MINERAL INTERFST

---

[ILLEGIBLE SUBPARAGRAPHS OMITTED]

THE UNITED STATE OF AMERICA

by <Signed by Martha A. Riviera>
(Signing Officer)

CHIEF, OIL & GAS LEASING UNIT JUL 26, 1989
(Title) (Date)

EFFECTIVE DATE OF LEASE AUGUST 1, 1989

[ILLEGIBLE SUBPARAGRAPHS OMITTED]

TESORO EXPLORATION AND PRODUCTION CO.

Duly executed this 11th day of August, 1989

<Signed>
B. DURHAB
VICE-PRESIDENT
[Signature of Lessee or
Attorney in Fact]

LEASE TERMS

[OTHER SUBPARAGRAPHS OMITTED]

# APPENDIX G

Copy of Unpublished Opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 97-40149, *United States of America v. 85,237 Acres of Land, More or Less, Et Al* (the Condemnation Action), filed September 17, 1997

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

No. 97-40149

Summary Calendar

---

UNITED STATES OF AMERICA

Plaintiff - Appellee

versus

85,237 ACRES OF LAND, MORE OR LESS, ET AL

Defendants,

BANK ONE, TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LELIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTON; JOHN H. MCMULLEN, JR; ANDY J.MCMULLEN

Defendants - Appellants

---

Appeal from the United States District Court
For the Southern District of Texas

---

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:

Appellants appeal the trial court's dismissal of their Rule 60(b) motion. We affirm.

I.

Appellants assert that the district court reached two erroneous legal conclusions. First, the Order Closing Civil Action, entered August 10, 1970, was a final judgment in this civil action. Second, a Quiet Title Act claim is an adverse claimant's exclusive means to challenge the United States' title to real property. We find Appellants' objections to these determinations to be without merit and therefore affirm the lower court's dismissal if their Rule 60(b) motion.

II.

On August 10, 1970, the district court entered in this case an Order Closing Civil Action. R. Vol. 4 at 344. The Order stated"

> "all matters and controversies have been adjudicated in the ...civil matter...and...it is...ORDERED that the above captioned civil action be and is hereby CLOSED and DROPPED from the Docket of the Court; subject, however, to the power of the Court to make such future Orders, if any, as may be necessary." Id.

Appelants argue that the last phrase of the ordfer denies finality to the

judgment since the trial court reserved the power to make any necessary future orders. We find this argument to be totally lacking.

The "requirement of finality is to be given a 'practical rather than a technical construction.'" Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)). It is well settled that a "final judgment" may not be the last possible order in a case. Gillespie, 379 U.S. at 152. The Order Closing Civil Action of August 10, 1970 adjudicated all the controversies with respect to all of the parties in the civil action. The last phrase of the order does not negate its finality.

Appellants next assert that a final judgment was never entered in this case because no notice of the condemnation proceeding was served on the remaindermen of the Langille Trust or on the Corporation. We find this argument to be unvailing as well.

Assuming that Appellants' are correct in their assertion that neither the remainder beneficiaries nor the Corporation received notice of the condemnation proceeding, the Order Closing Civil Action is nonetheless a final judgment. Since they did not receive notice and did not voluntarily appear in the proceeding, the

remaindermen and Corporation never became parties to the civil actgion. Nagle v. Lee. 807 F. 2d 435 (5th Cir. 1987). This absence of notice does not negate the finality of the district court's order of August 10, 1970 since this order resolved all controversies with respect to all persons who were parties to the suit. Id.

Finally, Appellants aver that the Order Closing Civil Action was not a final judgment because the Bank never received notice of the United States' Amended Petition in Condemnation which gave the owners of the subject parcels the right to elect to revest the mineral interests in themselves, subject to certain restrictions which are not of importance here. Any interest Appellants claim in the property through the Bank is nugatory. As Appellants admit, the Bank received adequate notice of the condemnation proceeding but failed to respond or appear in the action. By its inaction, the Bank waived any defense or objection it may have had to the taking or any right or benefit it may have received during the course of the proceeding. Fed. R. Civ. P 71A(e). After receiving notice, the Bank, as trustee of the Langille Trust, had a dsuty to keep abreast of the developments in the condemnation suit. The Bank's dereliction in its duty does not tarnish the finality of the

district court's Order Closing Civil Action.

III.

Appellants claim that the trial court erred in ruling that the exclusive means to challenge the United States' title to real property is a suit under the Quiet Title Act, 28 U.S.C. § 2409a (1994). By this ruling, the district court dismissed Appellants' Rule 60(b) motion for lack of subject matter jurisdiction. Though the court below in its order cast the net wider than necessary, we find that it reached the correct result.

Appellants contend that they were entitled to file a Rule 60(b) motion attacking the district court's final judgment since the remaindermen of the Langille Trust never received notice of the condemnation proceeding. Appellants misunderstand the effect if the lack of notice to the remaindermen.

As we stated, since the remaindermen did not receive notice and did not voluntarily appear in the suit, they were not parties to the condemnation action. Contrary to Appelants' belief, the law of this circuit establishes that non-parties to a federal eminent domain suit must assert their claims to the condemned property via an independant action against the united States, not by a Rule 60(b)

motion. Screven v. United States, 207 F. 2d 740, 741 (5th Cir. 1953). The lack of notice to the Langille Trust remaindermen does not foreclose Appellants' claims to the subject parcels as successors in interest to the remaindermen's interest in the land. United States v. 22.680 Acres, 438 F. 2d 75, 77 (5th Cir. 1971). However, the lack of notice to the remaindermen does preclude Appellants' use of Rule 60(b) as the vehicle with which to advance their claims of ownership in the property. Screven v. United States, 207 F. 2d at 741; See United States v. 22. 680 Acres, 438 F. 2d at 77-78.

Though the district court ruled that the Quiet Title Act "is the exclusive means by iwhich wdverse claimants may challenge the United States' title to real property", all we need to say is that this particular case, Appellants can not use Rule 60 (b) to press their claims against the United States with respect to their alleged ownership interest in the property in question and we say no more.

The judgment of the district court is AFFIRMED.

# APPENDIX H

Federal Rules of Civil Procedure Involved in the Case which Are Too Lengthy for Inclusion in the Body of the Petition

## APPENDIX H

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED IN THE CASE WHICH ARE TOO LENGTHY FOR INCLUSION IN THE BODY OF THE PETITION

### 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

**(a) Real Party in Interest**. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

**(b) Capacity to Sue or Be Sued**. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

**(c) Infants or Incompetent Persons**. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

## RULE 71A. CONDEMNATION OF PROPERTY

**(c) Complaint.**

*(1) Caption*. The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quality, and location, and at least one of the owners of some part of or interest in the property.

*(2) Contents*. The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the

time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

*(3) Filing.* In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

**(d) Process.**

*(1) Notice; Delivery.* Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

*(2) Same; Form.* Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where the attorney may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

*(3) Service of Notice.*

(A) Personal Service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with

Rule 4 upon a defendant whose residence is known and who resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States.

(B) Service by Publication. Upon the filing of a certificate of the plaintiff's attorney stating that the attorney believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed the defendant's place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally serviced as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

*(4) Return; Amendment.* Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4.

**(f) Amendment of Pleadings.** Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (I) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this

rule, upon any party affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment and shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve an answer to the amended pleading, in the form and manner and with the same effect as there provided.